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OCTOBER TERM, 1921.

No. 21, Original.

In the matter of the petition of the United States of America, owner of the American steamship *Western Maid*, for a writ of prohibition and/or a writ of mandamus against the Honorable J. Whittaker Thompson, Judge of the District Court of the United States for the Eastern District of Pennsylvania, and the other judges and officers of said court.

No. 22. Original.

In the matter of the petition of the United States of America, former requisitioned or chartered owner of the auxiliary schooner *Liberty*, for a writ of prohibition and/or a writ of mandamus against the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, and the officers of said court.

No. 23, Original.

In the matter of the petition of the United States of America, former requisitioned and chartered owner of the American steamship *Carolinian*, for a writ of prohibition and/or a writ of mandamus against the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, and the officers of said court.

BRIEF FOR THE UNITED STATES.

I.

Issues presented.

These applications, representative cases of a group of several hundred admiralty proceedings, involving many millions of dollars, present the following basic questions:

1. Whether Army troop and cargo transports, or Navy dispatch or guard boats, unarmed public vessels of the United States, while serving military needs during war emergency, can incur lien liabilities for collision losses, enforcible by admiralty proceedings *in rem* against such vessels after their release from such public service and their commitment to merchant service? or,

2. Whether or not the fiction of the admiralty and maritime practices, which personifies the commercial vessel and declares her an offender and responsible for collision losses, can in like degree personify unarmed public Government vessels—instruments of national defense, and subject such public vessels to lien liabilities for collision losses? or,

3. Whether or not the doctrine of Government immunity includes immunity from liability, as well as immunity from process; whether or not the privileges and prerogatives of sovereignty do not declare the sovereign's property devoted to public service exempt from lien liabilities in all jurisdictions?

4. Whether or not section 9 of the shipping act of 1916 waives the immunity of Government-owned

ships from arrest for losses arising out of their operation in public service—not merchant service?

II.

Classes of Government vessels.

A statement of the classes of vessels controlled by the Government during the war period is essential to a proper understanding of the questions thus presented. These classes are:

(*a*) Armed public vessels;
(*b*) Unarmed public vessels;
(*c*) Merchant vessels.

(*a*) Armed public vessels consisted of Government-owned or requisitioned or chartered vessels on the bare-boat basis, of adaptable design, which were converted into fighting ships. Included were tugs or smaller steamships equipped with mine-laying or mine-sweeping devices, which were employed in such operations. After the war the Government removed the fighting gear, reconditioned the vessels, and redelivered them to owners, who then obtained proper merchant licenses and placed them in merchant service.

(*b*) Unarmed public vessels, also *meeting the public needs of the Government as sovereign*, consisted of Government-owned or requisitioned or chartered vessels on the bare-boat basis, which were converted into partially armed or unarmed transports—carriers of troops and of ammunition, food, and clothing for the American Expeditionary Forces and for the other branches of the Government. Many were employed as Army and Navy dispatch boats in and about harbors. In most instances they were manned by naval crews, and placed under the control of the Army or Navy. These vessels, after their distinctly public service had ceased, had their Government gear removed, were reconditioned, proper merchant licenses obtained, and then were placed in merchant service. The steamships *Western Maid*, and *Carolinian* and the auxiliary schooner *Liberty* belong to this class.

(*c*) Merchant vessels consisted of Government owned or requisitioned vessels which were carriers of cargo and passengers for hire. The operation of each was a business enterprise designed for profit. The characteristics of the vessels of this class were their private merchant functions.

The jurisdictional questions presented relate solely to armed and unarmed public vessels of classes "A" and "B" and not to merchant vessels of class "C." The Government, by legislation, has consented to suit against its merchant vessels for collision losses sustained when such vessels are "purchased, chartered, or leased" from the Government and then while "solely employed in merchant service." (*The Lake Monroe*, 250 U. S. 246.) It has not waived its prerogatives of sovereignty, which declare its armed or unarmed transports and other vessels performing distinctly public service free of seizure or of liability or lien for collision losses.

III.

History of proceedings.

1. The *Western Maid*, a vessel at all times owned by the Government, while manned by the Navy and employed in the Army cargo transport service, on January 10, 1919, was in collision with the privately owned steamship *British Isles*. Later, after the *Western Maid's* release from the transport service and her return to the Shipping Board and commitment to merchant service, the owners of the *British Isles*, by authority of section 9 of the shipping act of 1916, filed a libel *in rem* against the *Western Maid* to recover such collision damages, demanding that process issue for the arrest or attachment of the *Western Maid* and that she be sold to pay the damages. The United States, appearing specially and without waiving any jurisdictional questions, filed its suggestion of want of jurisdiction, averring—

(1) That, as the *Western Maid* at all times has been a Government-owned vessel, and at the time of the collision had a distinctly public status, then being manned by a Navy crew and employed by her sovereign owner in the Army transport service, serving military needs during a war period, no suit could be maintained against the vessel *in rem*. Section 9 of the shipping act of 1916 has no application.

(2) That such proceedings, in substance and effect, were an action against the Government for a tort, alleged to have resulted from the incompetence or

want of skill of naval officers commissioned to man the *Western Maid*, and that for the responsibility for such losses this Government has not consented to suit.

(3) That, as the *Western Maid* at the time of the collision had a distinctly public status and then was employed as an instrument of sovereignty, in the exercise or manifestation of sovereign power, no liability or lien, by the happening of the collision, attached to the *Western Maid*, so as to become the subject matter of a libel *in rem* against her at any time. Her identity as a public vessel was merged in her sovereign owner; she cannot have an existence or personality separate and apart from her sovereign owner. The fiction of the personality of a vessel as applied to commercial vessels has no application to public vessels employed as instruments of sovereignty.

The district court ruled that, although at the time of the collision the *Western Maid* was manned by the Navy, operated and controlled by the War Department, and employed in public service, yet, as at the time the libel was filed the vessel has been released from war service and had been assigned to commercial service in which she was employed at the time of her seizure, the court had jurisdiction. It held, adopting the admiralty fiction which personifies the commercial ship, that the mere happening of the collision impressed upon the Army transport devoted to public service lien liabilities therefor, which, although then not enforcable, survived and lived with the vessel and became enforcable upon the vessel's commitment to merchant service. Section 9 of the shipping act of 1916 is stated to be related legislation.[1]

2. The auxiliary schooner *Liberty*, owned by the Boston Pilots, was requisitioned by the Government for war service. The Government duly commissioned her a naval vessel, manning her with commissioned officers and enlisted men of the Navy, and employed her as a guard boat in Boston Harbor—distinctly military service. On December 24, 1917, the Navy boat *Liberty* was in collision with the privately owned steam tug *Eureka*. Later, after the Navy Department had reconditioned the *Liberty*, released her from requisition, canceled her requisition charter, and redelivered her to the Boston Pilots, her owners, the owners of the *Eureka* filed a libel *in rem* against the *Liberty* to recover such collision damages. The United States attorney, appearing specially, filed a suggestion under authority of section 4 of the "Suits in Admiralty Act" (*infra*) and obtained the release of the vessel. Subsequently he filed the usual form of suggestion, denying that such collision losses could be asserted against the vessel *in rem*, for the reason that, as the *Liberty* was a naval vessel, devoted to military operations, no lien liability by the mere happening of the collision was impressed upon the vessel, and, therefore, none was enforcable by libel *in rem*

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[1] The district courts have made similar rulings in the following cases: *The Jeanette Skinner*, 266 Fed. 396; *The F. J. Luckenback*, 267 Fed. 931; *The Gloria*, 267 Fed. 929; *The Florence H.*, 248 Fed. 1012; *The Mavisbrook*, 270 Fed. 1011.

against the vessel at any time. The public service of the *Liberty* at the time of the collision declared her immune from lien liabilities for resulting losses. The district court overruled the suggestion upon the same reasoning as in the *Western Maid* opinion.

3. The S. S. *Carolinian*, privately owned, was requisitioned by the Government and allocated to the War Department for military service. On February 15, 1918, the *Carolinian*, then an Army transport, was in collision with the privately owned British steamer *Mavisbrook*. Later the *Carolinian* was reconditioned, released from service, and returned to her owners, when the owners of the *Mavisbrook* filed a libel *in rem* against the *Carolinian* to recover such collision damages. The Government, by authority of section 4 of the "Suits in Admiralty Act" (*infra*), filed its suggestion and obtained the release of the *Carolinian* from attachment. Later it filed a suggestion of want of jurisdiction, substantially in the same form as in the above cases, which the District Court overruled for the same reasons.

These applications to this court were then made. The issues now before this court are as thus indicated.

IV.

Related legislation.

1. SECTION 9 OF THE SHIPPING ACT.

Unless section 9 of the shipping act of September 7, 1916 (c. 451, 39 Stat. 728, 730), has waived the immunity of the United States and its vessels from suits *in rem* for losses arising while such vessels are employed by the Government as unarmed public vessels—in war service—the District Court, in any view, was without jurisdiction in the *Western Maid* case.

This section provides:

> Every vessel *purchased, chartered, or leased* from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while *employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels* whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. * * * (Italics ours.)

By this section any liabilities to which Government vessels became subjected must relate to collision liabilities arising from and during their employment solely as merchant vessels. The Government has not consented that such vessels may be sued *in rem* for collision losses arising while they are employed as instruments of sovereignty. Both the collision loss and the enforcement of the claim against the vessel must occur while the Government vessel is employed solely as a merchant vessel, and then is *operating for the account of others than the Government,* under charter or lease.

The *Western Maid* was property of the United States, at all times in its possession, and, except by its consent, was immune from judicial process. The waiver of the immunity of the United States from suits *in rem* against its vessels, by the provisions of section 9 of the shipping act of 1916, relates only to vessels "*purchased, chartered, or leased*" from the Government, and *then only with respect to liabilities arising or created when such vessels are "employed solely as merchant vessels.*"

As stated by Judge Ward in *The Carlo Poma*, 259 Fed. 369, 370, "the vessels referred to (sec. 9) are such as are operated, not by the Government, but by persons who have purchased, leased, or chartered them from the Government." The *Western Maid*, at the time of the collision, was operated by and for the Government and distinctly as a public vessel.

Section 9 of the act only becomes applicable when the collision, the subject of the libel, has happened while the vessel is employed as a merchant vessel. The vessel lies open to obligation only "while employed solely as a merchant vessel." The United States has not waived immunity from suits against its vessels for collision losses or damages incurred when such vessels are employed in public service.

The history of this legislation confirms this. (See hearings before the Committee on the Judiciary, House of Representatives, 66th Cong., 1st sess. on H. R. 7124, Serials 4 and 8.) Its purpose, as this court has suggested in the *Lake Monroe* case, 250 U. S. 246, 255, 256, was "*to subject them to the same duties and liabilities as privately owned* merchant vessels with which they competed. * * * Her

(*Lake Monroe*) service at the time (*of the collision*) was purely commercial * * * ." The commercial employment of the *Lake Monroe, at the time of the collision,* brought her within the operation of section 9.

Under section 9 the exposure to liability must exist only *during merchant service. The evil or injurious occurrence must happen while the vessel is "employed solely as a merchant vessel."* The liability, the subject of the claim, must arise from the vessel's employment or operation in merchant service. Otherwise section 9 has no application.

As the *Western Maid, at the time the collision occurred,* was not "purchased, chartered, or leased" from the Government, and was not then "employed solely as a merchant vessel," but was an instrument of sovereignty employed in war service, the present libel proceedings against her can not be maintained. Otherwise section 9 must be interpreted and applied as waiving the immunity of vessels of the United States from suit for liabilities resulting from the employment of Government vessels in distinctly public service.

Section 9 must be construed and applied strictly.

> Beyond the letter of such consent (of the United States to be sued) the courts may not go, no matter how beneficial they may deem it or in fact might be their possession of a larger jurisdiction, over the liabilities of the Government. *Schillinger* v. *United States,* 155 U. S. 163, 166.

In this view, the *Western Maid* was not subject to arrest, the district court was without jurisdiction and the writ of prohibition should be granted.

UNSUCCESSFUL EFFORTS TO OBTAIN GENERAL RELIEF FROM CONGRESS FOR COLLISION DAMAGES CAUSED BY PUBLIC VESSELS.

That the construction of section 9, *supra*, as suggested, is proper, is confirmed by the earnest requests made to Congress on several occasions by admiralty counsel, representing both foreign and domestic interests, to subject public vessels to the liabilities of merchant vessels and to provide remedies for the enforcement thereof. (See hearings before the Committee on the Judiciary, House of Representatives, 66th Cong., 1st Sess., on H. R. 7124, Serial 4, pp. 28, 29, and Serial 8; Congressional Record, 66th Cong., 2d Sess., volume 59, pp. 1829, 1833, 3548; also hearings before the Committee on Commerce, United States Senate, on S. 2253, p. 30.) After thorough consideration, Congress refused to subject public vessels to the admiralty jurisdiction or to grant a remedy *in personam* against the Government. Congress thus has expressed its opinion that the public interests did not demand that public vessels be subjected to the incurment of liabilities under the maritime law or to the enforcement of those liabilities by process against the Government. Congress reserved to itself the right to grant such relief as it desired in each individual case.

2. SECTION 4 OF THE "SUITS IN ADMIRALTY ACT."

Under section 9, many Government merchant vessels were attached for liabilities incurred during merchant service, requiring the entry of stipulation to secure the vessels' release. This was an economic waste, as the Government was the responsible party and always present. Consequently Congress passed the "Suits in admiralty act," dated March 9, 1920 (41 Stat. 525), prohibiting the arrest of Government-owned vessels, but authorizing suits *in personam* against the Government, with an election to proceed upon *in rem* principles. Thus the act is procedural only. Only Government vessels employed in the merchant service are subject to its provisions. As the Government then was selling or releasing its fleet to private parties, free of liens, in order to perfect the transfer and relieve the purchasers or others from embarrassments resulting from the arrest of the vessel upon liabilities alleged to have arisen during the Government's possession and control, section 4 was enacted to read:

> That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or *alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States* or by such corporation, *such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that* it is interested in such cause, *desire*

> *such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause*, and thereafter such cause shall proceed against the United States in accordance with the provisions of this act. (Italics ours.)

The purposes served by this section and its limitations are fully defined by the debates in Congress at the time of its enactment (Congressional Record, vol. 59, p. 1832):

> Mr. WALSH. Mr. Chairman, I move to strike out the last word.
>
> This section 4 is the one that relates to vessels which have previously been operated by the United States and have since passed into private ownership. Do I understand that it is the intention now, if suit is to be brought within two years after a collision occurs for damages which resulted while the vessel was being operated by the United States, but after she is returned to private ownership that the United States steps in and furnishes this stipulation and assumes the liability for the satisfaction of the decree and releases her from arrest, and so forth, just as if the United States still owned the vessel?
>
> Mr. VOLSTEAD. It is my understanding, * * *.
>
> Mr. HUSTED. *The United States*, it seems to me, would be in *exactly the same situation as to causes of action which arose after the United States Government parted with the possession of the ships as she would be in reference to causes*

> *of action that arose while she was in possession of the ships.*
>
> We have provided by the bill that, as to causes of action arising while the United States owns and is in possession of the ship, we dispense with the giving of any bond. The vessels are declared to be immune from arrest and seizure and from all process in the admiralty courts. But this is to cover the case of a vessel that was in collision, perhaps, while in the ownership and possession of the Government, but where no suit was started, and then she is sold to private owners and the Government is subsequently sued; and the vessel, not now being under the ownership and possession of the Government, therefore she would be liable as a private vessel and subject to arrest and seizure, just exactly as any other private vessel when sued. Where the United States is concerned, we provide here, by the suggestion of the Attorney General, that the Government will assume responsibility; that this bond may be done away with; that the bond which the Government of the United States might otherwise be subject to will be dispensed with. (Italics ours.)

The filing of suggestions under section 4 only determines the United States as claimant for the vessel and substitutes its credit for the payment of the decree finally entered, if any, in place and stead of the usual bond or stipulation for value otherwise entered to secure the release of a vessel from attachment. The proceedings continue as proceedings *in rem.*

Manifestly, if the libel does not state a cause of action, *in rem* against the vessel, this section can not create one.

The propriety for the Government filing its suggestion by authority of section 4 of the act in the *Carolinian* and *Liberty* cases is thus indicated. The Government, by the suggestion, only assumes responsibility for the payment of any decrees which the district courts, upon the libel and proofs, properly could enter against the ships themselves, upon *in rem* principles. If there is no *in rem* liability established on the part of the vessel, the libel must be dismissed.

V.

The Liberty and Carolinian are vessels belonging to the Government.

The *Liberty* and the *Carolinian*, by the terms of the bare-boat charter entered upon between owners and the Government, during the period of requisition, were vessels belonging to the Government. They were instruments of sovereignty—public vessels.

> *Baltimore Drydocks and Shipbuilding Company* v. *New York and Porto Rico Steamship Company, Owner, and the United States of America, Intervenor*, 262 Fed., 485;
>
> *The Masters, Wardens, and Assistants of the Trinity House* v. *Clark*, 4 M. & S. 288 (King's Bench, 1815–16);
>
> *The Sarpen*, L. R., P. D. (1916) 306; *The Matti*, L. R., P. D. (1918) 314;
>
> *Admiralty Commissioners* v. *Page and others*, L. R., K. B. (vol. 1 (1919) 299;

Thorpe v. *Hammond*, 12 Wall. 408, 415-417;
The Barnstable, 181 U. S. 464, 468.

The drafting of such privately owned vessels for war purpose and their actual employment for national defense declare them instruments of sovereignty.

VI.

The immunity from liability of public vessels.

1. GOVERNMENT NOT RESPONSIBLE FOR THE TORTS OF ITS OFFICERS OR AGENTS.

It must be conceded that the present libel relates solely to a tort committed by commissioned naval or Army officers in the control and operation of Army transports or Navy vessels serving public needs during an emergency. Unless there is some magic in such public vessels' personification, the Government can not be held for these torts. There is no distinction between the Government and its property. There should be no relief by indirection where Congress has not provided relief directly.

Bigby v. *United States*, 188 U. S. 400, 408;
Langford v. *United States*, 101 U. S. 341, 344;
Gibbons v. *United States*, 8 Wall. 269, 274.

Where it is proper for the Nation to assume liability and furnish a remedy, Congress wisely has reserved the matter for its own determination. We must assume that, at the proper time and as it is requested, diplomatically or otherwise, Congress will give these claims the consideration they merit.

2. PUBLIC VESSELS ARE PART OF THE SOVEREIGN STATE AND THEIR LIABILITIES ARE MERGED IN THOSE OF THE SOVEREIGN.

It also must be conceded that under local laws liens can neither be acquired nor enforced upon or against the property of the Government held for public use. The privileges and prerogatives of sovereignty, accorded the sovereign, are impressed upon the sovereign's public property.

> *United States* v. *Ansonia Brass and Copper Co.*, 218 U. S. 452;
> *Board of Commissioners* v. *O'Connor*, 86 Ind. 531–537;
> *Rowley* v. *Conklin*, 89 Minn. 172, 175.

There ought to be no distinction between the Government and its property devoted to public uses. Such public property is merged in its sovereign, and redress must be sought from the sovereign and not from the instrument he uses in the exercise of its legitimate functions. The exemption of its (armed or unarmed) public vessels, employed to serve war needs in an emergency, from suits in admiralty arises, not out of a want of power to sue the public owner, but out of a want of liability on the part of the vessel.

These observations find full confirmation in the views stated by Mr. Chief Justice Waite, then sitting on the Circuit Bench for the Southern District of New York, in *The Fidelity*, 16 Blatchf. 569, 572, 573; 8 Federal Cases, 4758 (on appeal from the District Court):

"A careful examination of the cases satisfies me that the *exemption of public vessels* from suits in admiralty arises not out of a want of power to sue the public owner, but out *of a want of liability on the part of the vessel.* A public vessel is part of the sovereignty to which she belongs and her liability is merged in that of the sovereign. Under such circumstances redress must be sought from the sovereign and not from the instruments he uses in the exercise of his legitimate functions. Public creditors *look to the public faith for their security and not to the public property.* But it is insisted that during the public ownership the maritime liability of the vessel may be incurred, although the remedy in admiralty is suspended. If this be so, the seamen employed on vessels of war, if their wages are not paid and their vessel is sold to private owners, to be employed in the ordinary business of commerce, may libel the vessel in the hands of her private owners to secure their money. A simple statement of such a proposition is all that is required to show its fallacy. *The real truth is that in such cases the maritime law passes by the thing and places the liability on the sovereign owner alone and not upon the maritime instrumentalities of his sovereignty.* The cases of *The Davis,* 10 Wall. (77 U. S.) 15, and *The Siren,* 7 Wall. (74 U. S.) 152, are not at all in conflict with this. * * * I do not understand that *The Siren* and *The Davis, supra,* go further than to decide that the property of the Government not devoted to the public

> use is subject to such liens." (See the *F. C. Latrobe*, 28 Fed. 373, 379.) [Italics ours.]

Pertinent observations made by the Court of Appeals of England in *The Parlement Belge* (4 Asp. M. C. at p. 234) are instructive:

Brett, L. J.—

> "I doubt very much whether a maritime lien would attach to a vessel after leaving the Government service for damage done by her whilst in the service."

Baggley (p. 237):

> "Suppose damage is done *by a ship of war* which is subsequently sold by the Government to a private individual, do you *say* that a lien would attach to her in the hands of her new owner for the damages done whilst a vessel of war?"

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> "We think he (sovereign) can not be indirectly pleaded any more than he could be directly pleaded."

The argument of the King's advocate in the case of *The Prins Frederik* (2 Dods. 451) is sound and persuasive.

These vessels, utilized as part of the military forces, supporting the sovereign power and maintaining its dignity and independence, can not have a personality separate and apart from their sovereign owner.

3. THE LAW MERCHANT PERSONIFIED THE COMMERCIAL SHIP NOT A PUBLIC SHIP.

The personification of a vessel declared by the law merchant and adopted by the admiralty and maritime practices, with relation to vessels employed in commercial trade, is fully accredited and the soundness of the rule is conceded. In theory, *as applied to commercial vessels,* the mere happening of a collision impresses upon such vessel a lien liability for the resulting damages, which travels with the thing wherever she goes and into whosesoever hands she may pass. It is a *jus in re,* conferring upon the party damaged a proprietary interest or privilege in commercial vessels. It is inchoate from the moment it attaches.

The commercial usages look upon the ship as the surest pledge for the compensation and indemnity of the injured party. Such hypothecation—the commitment of the security of the merchant vessel to satisfy claims and demands against her—is a commercial necessity. Her personification is a rule of indemnity. The origin of the rule and its purposes thus have been summarized. By Mr. Justice Grier in *Vandewater* v. *Mills,* 19 Howard, 82, 83:

> A maritime "privilege" or lien is adopted from the civil law and imports a *tacit hypothecation of the subject of it.*

By Mr. Justice Story in *United States* v. *Brig Malek Adhel,* 2 Howard 209, 234:

> The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof upon the general policy of that law which looks to the instrument itself, used as the means of the mischief, as *the best and surest pledge for the compensation and idemnity of the injured party.*

In *The China,* 7 Wall. 53, 68:

> It had its source in the *commercial usages* and jurisprudence of the middle ages * * * It gave him (creditor) a lien or privilege against it in preference to other creditors.

In *Eugene F. Moran,* 212 U. S. 466, 474:

> No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible on principles of agency or otherwise, is carried further here than in England. * * * Possibly the *survival of the fiction* has been helped *by the convenient security that it furnishes* just as no doubt the responsibility of a master for a servant's torts, that he has done his best to prevent, has been helped by the feeling that it is desirable to have someone who is able to pay.

In *The Young Mechanic,* 2 Curtis, 404, 410, 411.

> In my opinion the definition given by Pothier of an hypothecation is an accurate description of a maritime lien under our law.

> "The right which a creditor has in a thing of another, which right consists in the power to cause that thing to be sold, in order to have the debt paid out of the price. This is a right in the thing, a *jus in re.*" * * * A right which enables a creditor to institute a suit, to take a thing from any one who may possess it, and subject it by a sale to the payment of his debt; which so inheres in the thing as to accompany it into whosesoever hands it may pass by sale; which is not divested by a forfeiture or mortgage, or other incumbrance created by the debtor, can only be a *jus in re*, in contradistinction to a *jus ad rem*, or in contradistinction to a mere personal right or privilege. Though tacitly created by the law, and to be executed only by the aid of a court of justice, and resulting in a judicial sale, it is as really a property in the thing as the right of a pledgee, or the lien of a bailee for work.

(See Holmes on *The Common Law*, p. 25; Mayer's Admiralty Law and Practice, p. 8.)

Commercial vessels are sent in trade to all ports. Their owners are usually inaccessible for purposes of suit, and their personal responsibilities are uncertain. The necessities of the vessel's operation in merchant service demand that the vessel, the res, shall be responsible for her torts and contracts. Her personification or hypothecation accomplishes this. The bases of the laws governing merchant vessels is in aid of commerce, but can or should this rule, as applied to commercial vessels, personify or hypothecate Government vessels devoted to military operations in times of war—instruments of national defense during the period of an emergency? Such public vessels, devoted to national service, represent the Nation at war, or as attempting to effect national purposes. Perfect freedom from liability and freedom of action are essential to their employment. Ought the subjects of a foreign nation or our own citizens, through the happening of a collision, secure a *jus in re*, a proprietary interest, in a Government military vessel or other public vessel; ought they become co-owners with the sovereign?

The rule of reason is that a Government vessel, employed as an instrument of sovereignty—an Army transport, in aid of the national defense during an emergency—has her identity merged in her sovereign. When her devotion to public service ceases and she becomes an instrument in merchant service, *she assumes a new personality—a merchant vessel*, free of and unhampered by any liens or claims alleged to have arisen during her public service. An Army cargo transport personified is not the merchant vessel personified.

The theory finds support in the fact that no reported cases, prior to the armistice, have been found where foreign or domestic shipowners have attempted to recover collision damages, inflicted by a public vessel devoted to military service, by proceeding *in rem* against such public vessel after she has been sold or released by the Government and placed in commercial service.

War is the supreme test of sovereignty. The sovereign becomes all-powerful. The personal liberty of the citizens must be surrendered to it in war time. The personality of the man, by draft legislation, was absorbed by the Government. Surely the identity or personality of the ship must be—she became a mere tool of the sovereign and used as a weapon of national defense. By what right can rules of admiralty be allowed to assert superior claims for a public vessel, drafted by the War Department and utilized for public purposes?

This court, in its opinion delivered June 1, 1921, in *Ex-parte In the Matter of the State of New York, Edward S. Walsh, Superintendent*, etc., No. 25 Original, October Term, 1920 (unreported), denies that "the uniform operation and effect of the characteristic principles and rules of the maritime law as a body" can impose itself upon and overrule the privileges and prerogatives which belong to the sovereign. As stated:

> It is not inconsistent in principles to accord to the States, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.

As there can be no distinction between the Government and its property devoted to public use, is not this conclusion sound—that vessels or property of a sovereign, devoted to public uses, which enjoy exemption from lien liability or litigation, in all other judicial tribunals, enjoy like exemption in the courts of admiralty and maritime jurisdiction? The fiction of the admiralty law which personifies commercial vessels cannot, in like degree, personify public vessels, and impose upon them liabilities which are inconsistent with the privileges and prerogatives of sovereignty with which they are endowed.

4. SOVEREIGN IMMUNITY INCLUDES IMMUNITY FROM LIEN LIABILITY, AS WELL AS IMMUNITY FROM PROCESS.

No purposes can be served by reviewing the cases discussing procedural immunity, as this rule is definitely established. See *In re Muir*, 256 U. S. 000; *In re Hussem Bey*, 256, U. S. 000; *Ex parte, In the Matter of the State of New York*, Nos. 25, 26, Original, October Term, 1920 (unreported).[1]

Nor can the group of cases which have permitted actions for salvage and general average contribution, quasi contractual relations for which a liability

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[1] The English cases discussing procedural immunity are *The Prinz Frederick*, 2 Dod. 451; *The Constitution*, L. R., P. D. 39 (1879); *Mighell* v. *Sultan of Johore*, Q. B. D., vol. 1 (1894), 149; *The Parlement Belge*, 4 Asp. M. C. 234; *Young* v. *Scbtia*, 1903, A. C. 501; *The Jassy*, 1906 Prob. Div. 270; *The Broadmayne*, 1916, Prob. Div. 64; *The Gagara*, 1919, Prob. Div. 95; *Porto Alexandra*, 1920, Prob. Div. 30; *The Athol*, 1 W. Rob. 382 (1842); *The Resolute*, 33 L. T. 80; *The Thomas A. Scott*, 10 L. T. (U. S.) 726; *The Charkieh*, L. R., 4 A., and E. 59 (since overruled); *The Messicano*, 22 T. L. R. 519; *The Errisos*, Lloyd's List, Oct. 21, 1917, p. 5, 8.

The American cases are *In re Hussein Lufti Bey* (256 U. S.); *In re Muir*, 255 U. S.; *The Maipo*, 252 Fed. 627, aff. 259 Fed. 367; *The Carlo Poma*, 259 Fed. 369; *The Pessaro* (U. S. D. C., S. D. N. Y. decided Oct. 1, 1921); *The Attualita*, 238 Fed. 909; *The Pampa*, 245 Fed. 137; *The Athanasios*, 228 Fed. 558; *The Adriatic*, 258 Fed. 902; *The Roseric*, 254 Fed. 155; *The Luigi*, 230 Fed. 493; *The Exchange*, 7 Cranch. 117; *The Santissima Trinidad*, 7 Wheat. 283 (1822); *The Invincible*, 2 Gall. 29 (1814); *Briggs* v. *The Light Boats*, 11 Allen 157; *Mason* v. *Intercolonial Railway*, 197 Mass. 349.

in personam exists against the Government, *to be enforced against Government property, not in its possession nor devoted to public use,* aid in the solution of the present questions. *The Davis,* 10 Wall. 15; *Long* v. *Tampico,* 16 Fed. 491; *The Johnson Lighterage Co. No. 24,* 231 Fed. 365.

A maritime lien may not exist in a cause of collision *when the thing occasioning the tort was not the subject of a maritime lien.* (*The Rock Island Bridge,* 6 Wall. 213.) If the doctrine of immunity includes immunity from liability, as well as process, Government vessels devoted to public service can not be the subject of liens. *The consent of the Government to suit secures legal recognition, not merely the enforcement of a right against the State.*

Mr. Justice Holmes, in delivering the opinion of this court in *Kawananakoa* v. *Polyblank,* 205 U. S. 349, 353, thus stated the American doctrine of immunity from liability:

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes (*Leviathan,* c. 26, 2). A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground *that there can be no legal right as against the authority that makes the law on which the right depends.* (Italics ours.)

The law is reviewed in *Riddock* v. *State*, 123 Pac. Rep. 450, 452 (Wash., 1912), and by the cases there cited, to which reference is made.

Laski's "*The Responsibility of the State in England,*" 32 Harvard Law Review, 447, and Maguire's "*State Liability for Tort,*" 30 Harvard Law Review, 20, are the most recent articles reviewing this much theorized subject.

The prerogatives of sovereignty include *immunity from liability, as well as immunity from process.*

In these views, the district courts were without jurisdiction of the subject matter of the proceedings, and the writs of prohibition should issue.

5. THE CASES OF "THE SIREN" AND "WORKMEN *v.* NEW YORK."

The district courts are of opinion that certain obiter dicta expressions in the cases of *The Siren*, 7 Wall. 152, and *Workman* v. *City of New York*, 179 U. S. 552, control. They imply (but without any reference to whether the property was devoted to public use) that Government vessels must be declared offenders for collision losses—that the mere happening of collision impresses upon such vessels lien liability therefor, which becomes enforcible when the vessels are subject to seizure under the process of the court. Upon the authority of this rule jurisdiction was assumed over these vessels.

The *Siren*, a privately enemy owned vessel, was captured February 18, 1865, at Charleston and ordered to Boston for adjudication as a prize. On the way, while in charge of a pilot employed by the prize master, she collided with the sloop *Harper*. Later a libel in prize was filed, and thereunder the sloop was condemned and sold and the proceeds of sale, in the usual way, deposited in the registry of the court. The owners of the sloop then petitioned to have their collision losses, totaling about $300, paid out of the fund in court, the Government then having petitioned for a distribution of the fund.

The court found:

> It is a familiar doctrine of the common law, that the sovereign *can not be sued* in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the Government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They can not be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States* v. *Clarke*.

> The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, *there is no distinction between suits against the Government directly and suits against its property.* * * *
>
> * * * Here, however, the title was divested from the previous owner by the capture, that being lawful, and vested in the United States (in trust as to one-half for the captors), although the legality of the capture was not established until the sentence of condemnation. * * *
>
> For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, *can not be enforced by direct proceedings against the vessel.* It stands, in that respect, like a claim against the Government, incapable of enforcement without its consent, and *unavailable for any purpose.* * * *

However, it then stated the rule relied upon by the District Court:

> * * * Assuming, therefore, that the *Siren* was in fault, and that by the tort she committed a claim was created against her, we do not perceive any just ground for refusing

> its satisfaction out of the proceeds of her sale. *The Government is the actor in the suit for her condemnation. It asks for her sale,* and the proceeds coming into the registry of the court, come affected with all the claims which existed upon the vessel created subsequent to her capture. There is no authority, that we are aware of, which would exempt them *under these circumstances,* because of the exemption of the Government from a direct proceeding *in rem* against the vessel whilst in its custody.

The *Siren* is a prize cause, the subject—forfeiture as a prize. Forfeiture and prize cases stand apart from *in rem* proceedings to recover collision losses. The property was not devoted to public use—in no sense was it an instrument of sovereignty. The fund arising from the sale of the vessel was before the court for distribution. The Government, as actor, sought the distribution of the fund.

The sound distinction between the *Siren* and the instant cases is the one observed by Mr. Justice Waite in the *Fidelity, supra:*

> The *Siren* was a case of prize, and the question was, whether damages caused by a collision for which she was in fault, while on her way into port for adjudication, should be paid out of the proceeds of her sale on condemnation. *No question of public use was involved.* There was nothing to take it out of the general rules of the maritime law, *except public ownership,* and that, all will concede, is not enough. *Property does not necessarily become a part of the sovereignty because it is owned by the sovereign.*

> *To make it so, it must be devoted to the public use and must be employed in carrying on the operations of the Government.* There may be some expressions of the learned justices who wrote the opinions in these cases (*Siren*—the *Davis*) which, if separated from the facts then under consideration, would indicate that the lien extended to public vessels employed in the public service, as well as to others; but the question was not up for determination and it is proper, therefore, to confine the actual decision to the cases as they stand. (Italics ours.)

Or as observed in *Carr* v. *United States*, 98 U. S. 433, 439:

> It was held (in the *Siren*) that, inasmuch as the United States had resorted to the aid of the court to procure the condemnation of the *Siren* and had thus placed her proceeds in the course of judicial administration, any proper claims against the vessel itself *prior to that of the Government* might well be satisfied out of such proceeds. (Italics ours.)

The Government acquired the *Siren* subject to proper claims accruing prior to her condemnation and sale as a prize. At the time of the collision, the *Siren* was not Government property devoted to public use; at no time was she devoted to public use.

Workman v. *City of New York*, *supra*, has recently been considered by this court in *Ex parte State of New York et al.*, *supra*. The libel was *in personam* against a municipality, adjudged *not to be endowed with the privileges of sovereignty accorded the State.*

The obiter dicta expressions, stated in the majority opinion, should not control the determination of the important questions which the present case presents.

Is not this decision distinguishable from the present case for the following reasons?

(*a*) Both at the time of the collision (when the liability against the municipality was created) and at the time of suit, the City of New York (the municipal corporation), as respondent, was subject to the admiralty jurisdiction of the court for the loss in suit.

(*b*) It was a suit *in personam*. No maritime lien was involved. The question as to the liability of the fire boat *in rem* was not involved. The majority opinion (p. 572) expressly states that its opinion is not to be construed as deciding that a municipal corporation's vessel was liable *in rem*.

(*c*) *No question of sovereignty was involved.* The contention was that the "public use" by a private municipal corporation of a vessel owned by such private corporation exempted not only the vessel but also the private corporation from suit. This court held only that the municipal corporation was suable *in personam* for the tortious act of its agent, the master of the vessel. The majority opinion states (p. 566):

> We of course concede that where maritime torts have been committed by the officers of a sovereign and complaint has been made in a court of admiralty that court has declined to exercise jurisdiction * * *.

(*d*) The decision was based upon the principle of respondeat superior, municipality, as principal, responsible for tortuous act of its officer, master of the fire boat. (See Opinion, p. 565.)

(*e*) The dissenting opinion of four justices limits the authority, if any, of the *obiter dicta* in the majority opinion.

VII.

The procedure adopted by the Government in the District Court was proper.

The return in the *Western Maid* case suggests possible criticism of the procedure adopted by the Government in the District Court. Process was issued against the *Western Maid* and, under the writ, the marshal took physical custody of the vessel (Pet., p. 20). Then, without admitting the jurisdiction of the court, and without submitting the rights of the United States to the jurisdiction, the United States made claim for the vessel (Pet., p. 18), and furnished stipulation for the release of the *Western Maid* (Pet., p. 21). This stipulation names the United States as owner and claimant and is signed by the United States Shipping Board Emergency Fleet Corporation as *stipulator*. (Pet., pp. 21, 22.) The condition of the stipulation is—

> * * * is such that if it shall hereafter be finally determined that this court has jurisdiction to proceed in said cause, and if claimant herein and the United States Shipping Board Emergency Fleet Coporation, the stipulator undersigned, shall abide by all orders

> of the court interlocutory and final and pay the amount awarded by the final decree * * * then this stipulation shall be void * * * .

The Government then filed its suggestion of want of jurisdiction. No traverse to the suggestion was filed, and the question of jurisdiction was heard and decided by the District Court upon the facts stated in the suggestion and supporting affidavit.

This procedure is proper—has been adopted by the Government in all its cases and has received universal approval.

> *The Lake Monroe*, 250 U. S. 246.
> *Ex-parte in the State of New York et al., supra* (opinions filed June 1, 1921).

This return also suggests that the Fleet Corporation has been made a direct party in interest. This must be conceded an error. The proceeding always has been and now is a *proceeding in rem.* The Fleet Corporation appears of record only as stipulator. The proceeding continues a proceeding *in rem.* It has not been and can not be translated into a proceeding *in personam* against the Fleet Corporation.

VIII.

The remedy by writ of prohibition is proper.

The returns filed also question the propriety of the present applications to this court.

The most recent opinion is *Ex parte In the matter of the State of New York*, No. 25, Original, October Term, 1920. This court said:

> The power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction is specifically conferred upon this court by section 234, Judicial Code (act of March 3, 1911, ch. 231, 36 Stat. 1087, 1156). And the fact that the objection to the jurisdiction of the court below might be raised by an appeal from the final decree is not in all cases a valid objection to the issuance of a prohibition at the outset, where a court of admiralty assumes to take cognizance of matters over which it has no lawful jurisdiction. *In re Cooper,* 143 U. S. 472, 495. * * *
>
> The want of authority in the district court to entertain these proceedings *in personam* under rule 59 (now 56) brought by the claimants against Mr. Walsh as superintendent of public works of the State of New York is so clear, and the fact that the proceedings *are in essence suits against the State without its consent is so evident, that instead of permitting them to run their slow course to final decree, with inevitably futile result, the writ of prohibition should be issued as prayed.* *Ex parte Simons,* 247 U. S. 231, 239; *Ex parte Peterson,* 253 U. S. 300, 305.

The district court was without jurisdiction to proceed against the *Western Maid,* and the district courts were without jurisdiction of the subject matter of all the libels—the liability of a public vessel for a tort.

IX.

Importance of the question.

There are more than *200 admiralty cases now pending in the district courts, with losses running into millions of dollars,* which will be controlled by the ruling in these cases, related cases now before this court. Congress, by appropriate action, has always provided relief for claims relating to war losses. It must be assumed Congress will properly provide redress in each of these cases when and as it considers it proper to do so. The procedure adopted in the instant case to collect a war claim is novel and without precedent.

The application of section 9 of the shipping act (*supra*) as suggested in the *Western Maid* case has been definitely raised in at least 30 cases, involving considerable sums of money. The Government suggests the immediate necessity for the ruling of this court upon the subject.

The hearings of these numerous cases are being delayed until after the questions now presented are ruled upon by this court.

X.

Conclusion.

The want of authority in the district court to entertain this proceeding *in rem* against the *Western Maid* or to assume jurisdiction over the subject matter of each of the libels is so evident that the writs of prohibition should issue as prayed. The relation of this case to the several hundred other pending cases, involving the same substantial questions, justifies the Government in requesting that the questions submitted to this court now shall be fully determined.

Respectfully,

James M. Beck,
Solicitor General.
Albert Ottinger,
Assistant Attorney General.

J. Frank Staley,
Special Assistant to the Attorney General, in Admiralty.

○

[illegible] Original

In the Supreme Court of the United States

[illegible] Term, [illegible]

In the Matter of the Petition of the United States of America, [illegible] Commanding Officer of the [illegible] for a Writ of Prohibition [illegible] a Writ of Mandamus against the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, and the Opinion of Said Court.

[illegible] for a Writ of Prohibition [illegible] Writ of Mandamus

[illegible]

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. —, ORIGINAL.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA, AS FORMER REQUISITIONED OR CHARTERED OWNER OF THE AUXILIARY SCHOONER "LIBERTY."

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

And now comes Harry M. Daugherty, Attorney General of the United States, on behalf of the United States of America, former requisitioned or chartered owner of the auxiliary schooner *Liberty*, and moves:

1. For leave to file the petition for a writ of prohibition and/or a writ of mandamus, hereto annexed, and

2. That a rule be entered and issued directing the District Court of the United States for the District of Massachusetts and the Honorable James M. Morton, jr., a judge thereof, and the officers of said court, to show cause why a writ of prohibition and/or a writ of mandamus should not issue against them and each of them, in accordance with the prayer of said petition, and why the United States of America should not have such other and further relief therein as may be just.

HARRY M. DAUGHERTY,
Attorney General of the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. —, ORIGINAL.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA, FORMER REQUISITIONED OR CHARTERED OWNER OF THE AMERICAN AUXILIARY SCHOONER "LIBERTY," FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS AGAINST THE HONORABLE JAMES M. MORTON, JR., JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, AND THE OFFICERS OF SAID COURT.

MOTION AND PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

To the honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Harry M. Daugherty, Attorney General of the United States, on behalf of the United States of America, former requisitioned or chartered owner of the auxiliary schooner *Liberty*, against the Honorable James M. Morton, jr., judge of the District Court of the United States for the District of Massachusetts, sitting in admiralty, and against the officers of said court, respectfully represents:

First. That on February 5, 1921, the Staples Transportation Company, owner of the steam tug *Eureka,* filed its libel in the District Court of the United States for the District of Massachusetts, in admiralty, against the auxiliary schooner *Liberty,* to recover damages in the sum of $8,500, resulting from collision between the vessels on December 24, 1917, in Boston Harbor. It prayed that process, according to the course and practice in causes of admiralty and maritime jurisdiction, issue against the auxiliary schooner *Liberty* and that the court decree to libelant its damages and that the said schooner be condemned and sold to satisfy the same. A copy of the libel, as part of the record of proceedings in said court, is hereto annexed.

Second. That theretofore the auxiliary schooner, then privately owned, had been requisitioned or chartered upon the bare boat basis by the United States, represented by the commandant of the first naval district, acting under direction of the Secretary of the Navy, pursuant to authority granted by the act of August 29, 1916, and then was a vessel belonging to the United States. That at the time of the collision, the United States had commissioned her as a naval dispatch boat and employed her to serve military needs in war service. That, subsequently, the *Liberty* was released from requisition or charter and redelivered to her owners, who then employed her as a pilot boat, in which service the schooner was engaged at the time of the filing of the said libel and her attachment thereunder.

Third. That thereafter, by virtue of the authority of section 4 of the act of Congress entitled "Suits in admiralty act," approved March 9, 1920 (41 Stat. 525), the United States filed its suggestion that it was interested in such proceedings, desired the immediate release of the auxiliary schooner *Liberty* from arrest or attachment without bond or stipulation, and that it assumed the liability for the satisfaction of any decree entered therein. Thereupon the said District Court directed the release of the said schooner from attachment, without bond or stipulation.

Fourth. That thereafter, Daniel J. Gallagher, the United States attorney for the District of Massachusetts, specially appearing on behalf of the United States for the purpose of questioning the jurisdiction of said court to proceed in said cause, filed of record suggestion that inasmuch as the *Liberty*, at the time of the collision, was a vessel belonging to the United States, employed by its Navy Department as a guard or dispatch boat to serve military needs, she was immune from liability or lien for collision damages, and the court was without jurisdiction to proceed against the vessel or to hear and determine the matters alleged in said libel. Copy of said suggestion, as part of the record of proceedings in said court, is hereto annexed.

Fifth. That thereafter the matter came on for hearing before James M. Morton, jr., the judge of said court, upon the right of said court to assume jurisdiction or otherwise to hear and determine the matters alleged in said libel, who handed down an opinion in which, while finding the *Liberty* at the time of the collision was a vessel belonging to the United States and employed as a Navy dispatch or patrol boat to serve military needs, nevertheless overruled the Government's suggestion and assumed jurisdiction, and is proceeding to hear and determine the merits of the libel. Copy of said opinion, as part of the record of proceedings in said court, is hereto annexed.

Sixth. That a certified copy of the record of proceedings in said District Court of the United States for the District of Massachusetts, filed in the said cause, is hereto annexed and made a part hereof.

Seventh. That it is now represented that inasmuch as at the time of the collision the *Liberty* was a commissioned Navy dispatch or patrol boat employed by this sovereign petitioner to serve military needs, she was immune from liability or lien for said collision damages. Further, that said libel proceeding, in substance and effect, is an action against your sovereign petitioner and presents a claim for tort arising out of a collision alleged to have resulted from the incompetence or want of skill of naval officers commissioned to man and operate a naval vessel, and that for the liability of such losses this sovereign petitioner has not consented to suit. By reason thereof, the said District Court was, and is, without jurisdiction to proceed to hear and determine the matters alleged in said libel *in rem* filed against said schooner.

Wherefore, the said Harry M. Daugherty, Attorney General of the United States, the aid of this honorable court, respectfully requesting, prays:

1. That a writ of prohibition may issue out of this honorable court to the said Honorable James M. Morton, jr., judge of the United States District Court for the District of Massachusetts and/or the officers of said court, prohibiting him and them from taking any steps whatsoever in the cause aforesaid, and, generally, from the further exercise of jurisdiction in said cause, or the enforcing of any order, judgment, or decree made under color thereof.

2. That a writ of mandamus be issued out of and from this honorable court, directing and commanding the Honorable James M. Morton, jr., judge of the United States District Court for the District of Massachusetts, to vacate the order so entered by him, overruling the Government's exception to jurisdiction, and, to enter an order in said cause declaring the said auxiliary schooner *Liberty* immune from liability or lien for said collision damages.

3. That the court grant to the United States of America such other and further relief as may be just in the premises.

HARRY M. DAUGHERTY,
Attorney General of the
United States of America.

I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

HARRY M. DAUGHERTY.

Subscribed and sworn to before me this 25th day of March, 1921.

[SEAL.] JULIA B. RISHEL,
Notary Public, District of Columbia.

TRANSCRIPT OF PROCEEDINGS IN DISTRICT COURT.

No. 1936. In Admiralty.

Staples Transportation Co., Libt., *v.* Auxiliary Schooner *Liberty.*

The libel in this cause was filed in the clerk's office of said court on the fifth day of February, A. D. 1921, and is as follows:

LIBEL.

To the Honorable James M. Morton, jr., judge of the United States District Court within and for the District of Massachusetts:

Staples Transportation Company, owner of the steam tug *Eureka*, exhibits this its libel against the auxiliary schooner *Liberty*, her boats, engines, boilers, machinery, tackle, apparel, and furniture, in a cause of collision civil and maritime, and thereupon alleges as follows:

First. The libellant is a corporation duly organized and existing according to law and having a usual place of business in Fall River in the District of Massachusetts, and at the time of the events hereinafter mentioned was the owner of the steam tug *Eureka*, a vessel of the burden of 353 tons gross, 186 tons net, 128 feet in length, 26.3 feet in breadth, and at said time tight, staunch, strong, well-manned, and equipped, and commanded by Ernest M. Plummer, a competent and experienced master.

Second. While said steam tug, having in tow on a hawser Consolidation Coal Company barge *No. 15*, bound for the port of Boston in said district, was approaching Broad Sound Channel at the entrance to said port, at about 4.40 a. m., December 24, 1917, a red light of a vessel apparently under sail was seen about four points on the starboard bow. The night was dark, but there was good visibility. The wind was WSW., fresh. The master and mate of said steam tug were in the pilot house, the latter being at the wheel, maintaining a NW. course; a lookout was stationed on her bow, and her lights were properly set and brightly burning. Noting that said vessel was proceeding by the wind on her starboard tack upon a course approximately SSW., crossing that of the said steam tug, the wheel of the latter was ported, with the intent to pass under the stern of said vessel. This change of course gave the approaching vessel a bearing on said steam tug's port bow. While proceeding thus, the other vessel, which as it later appeared was the pilot guard auxiliary *Liberty*, S. P. No. 1229, operated by the Government of the United States of America, now called the *Liberty*, suddenly wore ship before the wind, and showed his green light. Danger whistles were immediately blown on said steam tug, her engines stopped, and reversed, but said guard boat collided with said tug on the latter's port bow about seven or eight feet from her stem.

Third. As a result of said collision the libellant sustained damages in an amount now of approximately eighty-five hundred dollars ($8,500).

Fourth. Said collision and the damages resulting therefrom were caused wholly by the fault of the guard boat *Liberty* and those in charge of her as follows:

1. In not having a competent officer in charge of said vessel.

2. In not having a competent lookout properly stationed and attentive to his duties.

3. In not having a proper helmsman at the wheel of said vessel.

4. In that said guard boat, being the privileged vessel, did not maintain her course and speed.

5. In wearing ship across the bows of said steam tug.

6. In executing a baffling manoeuvre while in close proximity to said steam tug.

7. In other faults to be shown at the trial of the case.

Fifth. The said auxiliary schooner *Liberty* is now lying in the port of Boston and within the admiralty and maritime jurisdiction of this honorable court.

Sixth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore the libellant prays that process in due form of law may issue against the said auxiliary schooner *Liberty*, her engines, boilers, boats, machinery, tackle, apparel, and furniture, and that all persons having or claiming any interest therein may be summoned to appear and answer in the premises and that this honorable court will pronounce for the libellant's damages, and decree that the same may be paid, together with its costs, and for such other and further relief as to right and justice may appertain and as this honorable court is competent to give in the premises.

STAPLES TRANSPORTATION COMPANY,
By C. G. HANNAH, *Pres't.*

BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors.

STATE OF NEW YORK,
County of New York, ss:

C. G. Hannah, being duly sworn, says: I am the president of Staples Transportation Company. I have read the foregoing libel, and the same is true to the best of my knowledge, information, and belief. The sources of my knowledge or information are statements made by employees of the libellant and other persons. The reason why this vertification is not made by the libellant is because it is a corporation.

C. G. HANNAH.

Sworn to before me this — day of January, 1921.
[SEAL.] C. V. BERTSCHE,
Notary Public, Kings Co.

(County clerk's No. 210. Register No. 2195. Certificate filed in NewYork Co. County clerk No. 470. Register No. 2365. Term expires March 30th, 1922.)

On the fourteenth day of February, 1921, the following suggestion of interest was filed by the United States attorney.

SUGGESTION OF INTEREST.

Now comes Daniel J. Gallagher, United States attorney within and for the District of Massachusetts, as proctor for the Government of the United States of America, chartered owner of the auxiliary schooner *Liberty* at the time of the collision stated by the libel filed herein, and appears specially to suggest to the court that at the time of the said collision, December 24, 1917, the auxiliary schooner *Liberty* had been requisitioned by the Government of the United States upon a bare boat basis by virtue of the authority of the act of Congress of June 15, 1917, and the Executive order of July 11, 1917, issued pursuant thereto, and that thereby the said auxiliary schooner *Liberty* at the time of the happening of said collision was a vessel belonging to the United States; that the United States is interested in said cause, desires the release of the said auxiliary schooner *Liberty* and assumes the liability for the satisfaction of any decree obtained by the libellant in said cause..

Daniel J. Gallagher,
United States Attorney.
By Lewis Goldberg,
Special Asst. U. S. Attorney,
Proctors for the United States.

District Court of the United States,
District of Massachusetts.

Now comes Lewis Goldberg, special assistant United States attorney for the District of Massachusetts, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing suggestion of interest and plea to jurisdiction are true to the best of his knowledge, information, and belief.

Subscribed and sworn to, before me, this fourteenth day of March, A. D. 1921.

Frank H. Mason,
Deputy Clerk.

On said fourteenth day of February, 1921, the following suggestion of interest and plea to jurisdiction was filed by the United States attorney.

SUGGESTION OF INTEREST AND PLEA TO JURISDICTION.

Now comes Daniel J. Gallagher, United States attorney within and for the District of Massachusetts, as proctor for the Government of the United States of America, chartered owner of the auxiliary schooner *Liberty* at the time of the collision stated by the libel filed herein, and appears specially to suggest to the court that at the time of the said collision, December 24, 1917, the auxiliary schooner *Liberty* had been requisitioned by the Government of the United States upon a bare-boat basis, a copy of which bare-boat charter is filed herewith and prayed to be taken as part hereof by virtue of the authority of the act of Congress of June 15, 1917, and the Executive order of July 11, 1917, issued pursuant thereto, and that thereby the said auxiliary schooner *Liberty* at the time of the happening of said collision was a vessel belonging to the United States.

That at the time of said collision said auxiliary schooner *Liberty* had been assigned to the Navy Department of the United States and was employed by it as a guard boat in Boston Harbor, then being manned by and through a Navy crew furnished by the Navy Department of the United States; that after said collision the Navy Department released said auxiliary schooner *Liberty* from requisition and cancelled her requisition charter and redelivered the vessel to her owners, and at the time of the filing of the libel herein said auxiliary schooner was employed by her owners in their own service.

Further, it is suggested that as the said auxiliary schooner *Liberty* at the time of said collision was a vessel belonging to the United States and employed in public service for war needs, no liability by reason of said collision was created which survives or becomes enforceable against the said vessel upon her redelivery from public service to her owners as aforesaid; that there is now no collision claim enforceable in rem against the said auxiliary schooner *Liberty*.

Wherefore the United States prays that this court declare that there is no right in libellant herein to maintain said libel in rem against said steamship to recover its collision damages and that the said libel be dismissed with costs.

DANIEL J. GALLAGHER,
United States Attorney,
By LEWIS GOLDBERG,
Special Assistant U. S. Attorney,
Proctors for the United States.

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts.

Now comes Lewis Goldberg, special assistant United States attorney for the District of Massachusetts, who, being duly sworn according to law, deposes and says that the facts set forth in the foregoing suggestion of interest and plea to jurisdiction are true to the best of his knowledge, information, and belief.

Subscribed and sworn to before me this fourteenth day of March, A. D. 1921.

FRANK H. MASON,
Deputy Clerk.

LEASE AGREEMENT.

Agreement made this third day of August, 1917, by and between Boston Pilot's Relief Society (the owner) and the United States, represented by the commandant of the naval district, acting under direction of the Secretary of the Navy in pursuance of authority granted by the act of August 29, 1916.

Whereas the Government may, in case of war or national emergency, desire to use the owner's vessel *Liberty No. III* temporarily for naval purposes; and

Whereas the owner and the commandant have agreed on the terms under which said vessel may be so used;

Now, therefore, this agreement witnesseth that,

First. The owner hereby agrees to let and demise his said vessel *Liberty No. III* her engines, boilers, tackle, apparel, and equipment unto the Government to be used in such manner, for such purposes and for such period of time as may in the discretion of the Secretary of the Navy be desirable.

Second. Said vessel shall be delivered to the commandant by the owner, as soon as possible after receipt of notification by the Navy Department to deliver her, with such fuel, stores, and supplies as may be on board at the time, at such place as the commandant may designate.

Third. The fair value of said vessel at the time of delivery shall be determined as follows:

(*a*) By taking the appraised value thereof as fixed by the Board of Appraisal for Merchant and Private Vessels appointed by the Navy Department by order of April 2nd, 1917.

Fourth. The Government shall, in due course, after such delivery, pay to the owner the fair value of the fuel, stores, and supplies on board said vessel at the time of delivery, as determined by a board to be appointed by the commandant, or as may be agreed on between the parties hereto.

Fifth. The Government shall pay to the owner as charter money for said vessel for the use thereof from the time of her delivery until the return thereof to the owner, a monthly sum

(*c*) One dollar ($1.00) per month, which sum is hereby agreed upon as the charter rate of hire.

Sixth. Said vessel shall be returned to the owner at the place of delivery at a date not later than a reasonable time after peace is declared, and thereupon the Government shall pay to the owner a sum equal to the cost to him of restoring the vessel to the same condition and good order in all respects in which she was at the time of delivery to the commandant, ordinary wear and tear excepted, such sum to be determined by (*a*) a board of appraisal to be appointed by the Navy Department, and in addition thereto, when the charter rate of hire is $1.00 per month, a further sum to be determined by said last-mentioned board to reimburse the owner for all depreciation and to fairly indemnify him for the loss of the use of said vessel during the time reasonably needed for repairs, less the value of fuel, stores, and supplies on board at the time of such return.

Seventh. All determinations of the Board of Appraisal or boards of arbitration hereinbefore provided for shall be subject to the approval of the Secretary of the Navy.

Eighth. In case of loss the Government agrees to pay to the owner the value of the vessel at the time of her delivery to the commandant, determined as hereinbefore provided.

Ninth. No member of, or delegate to, Congress shall have any interest in this agreement.

Signed, sealed, and delivered on the day and year first above written.

Boston Pilot's Relief Society.
By John H. Low, *Pres.*

In presence of:
Horace W. Folger.
S. L. Key,
Acting Commandant, First Naval District.

On Aug. 28th, 1917, appeared before me John H. Low known to me to be the person who signed the written paper and acknowledged same to be his free act and deed.

William C. Chick,
Notary Public.

L. Clarke.

On the sixteenth day of February, 1921, it was ordered by the court that "Suggestion of interest" filed in the United States be accepted and the United States be made respondent.

On the same day of February, 1921, the libellant's prayer for warrant of arrest against the *Liberty* was denied by the court and the plea of the United States was adjudged bad with leave to answer.

On the twenty-fourth day of February, 1921, the following motion of libellant that United States be required to answer was filed.

MOTION OF LIBELLANT THAT UNITED STATES BE REQUIRED TO ANSWER.

Now comes the libellant in the above entitled case and moves that the United States of America, admitted on February 16, 1921, as a party respondent may be ordered to answer the libel within thirty days from the entry of said order of admission and that the case be placed upon the list for trial at the March sitting of the court.

BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors for Libellant.

On the twenty-eighth day of February, 1921, it was ordered by the court that answer be filed by the United States on or before March 18, 1921.

On the eleventh day of March, 1921, the following order of court was entered.

ORDER OF COURT.

MORTON, J.—In the above-entitled cause, it is now, to wit, March 11, 1921, *Ordered*, that pending prohibition proceedings in Supreme Court of the United States raising question of jurisdiction in this District Court, the proceedings in this case are hereby suspended until further order of this court.

District Court of the United States, District of Massachusetts.

I, James S. Allen, clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is a true copy of the record of the District Court up to and including March 11, 1921, in the cause in said District Court depending, entitled "Staples Transportation Company, libellant, *v.* Auxiliary Schooner *Liberty*, and numbered 1936 on the civil docket of said court.

In testimony whereof, I hereunto set my hand, and affix the seal of said court, at Boston, in said district, this sixteenth day of March, A. D. 1921.

[SEAL.] JAMES S. ALLEN, *Clerk.*

No. 1936, Civil. District Court of the United States, District of Massachusetts. Staples Transportation Company *v.* Auxiliary Schooner *Liberty.*

OPINION.

(16 February, 1921.)

MORTON, J. During the war the pilot boat *Liberty*, owned by the Boston Pilots' Relief Society, was turned over to the United States at a nominal rental (one dollar per month), and was manned by a crew from the United States Navy. While so employed she collided with and injured, as is alleged, the libellant's tug *Eureka*. After the close of the war the *Liberty* was returned to her owners and is now in their possession. The facts are as alleged in the "Suggestion of interest" and "Suggestion of interest and plea to jurisdiction" filed by the United States attorney on behalf of the United States.

The owner of the *Eureka* has filed this libel against the *Liberty* to recover damages for said collision. The United States moves to intervene and be substituted as party respondent under section 4 of the act of 9 March, 1920. It also prays that the libel be dismissed upon the ground that as the collision occurred while the *Liberty* was in the possession of the United States and being operated by it, as to which there is no dispute, the libellant is not entitled to proceed against her after her return to private ownership.

The contention of the libellant is that the *Liberty* became liable for damages caused by the collision; that this right could not be enforced against her while she was a Government vessel because property of the sovereign can not be seized; but that when she ceased to be in the possession of the Government the protection from arrest which she had enjoyed as a Government vessel ended and she became liable to suit in rem. For the Government it is contended in support of the prayer for dismissal of the libel that while the *Liberty* was in the possession of the Government and being operated by it for governmental uses, she was an instrumentality of government against which no right in rem was created by the collision; and that there is therefore nothing on which the present libel can stand.

The question presented has been decided in favor of the libellant's contention by Judge Rose in the *Ceylon Maru*, 266 F. R., 397 (D. Ct. Md.); and there are direct expressions of opinion to the same effect by Judge Mack in the *F. J. Luckenbach*, 267 F. R., 931 (D. Ct. N. Y.), by Judge Learned Hand in the *Gloria*, 267 F. R., 929 (D. Ct. N. Y.), and by Judge Thompson in the *City of Philadelphia*, 263 F. R., 234 (D. Ct. Pa.). This result undoubtedly carries the personification of a vessel to an extreme point, as counsel for the United States suggests; but the alternative view is not free from difficulties.

As the law stands I am of opinion that the facts alleged in the "Suggestion of interest and plea to jurisdiction" do not constitute a defense to the libel.

An order may be entered accepting the "Suggestion of interest" filed by the United States and making the United States the respondent.

The libellant's prayer for a warrant of arrest against the *Liberty* is denied.

The plea of the United States is adjudged bad, with leave to answer.

District Court of the United States, District of Massachusetts.

I, James S. Allen, clerk of the District Court of the United States for the District of Massachusetts, hereby certify that the foregoing is a true copy of the opinion handed down February 16, 1921, in the cause in said District Court depending, entitled "Staples Transportation Company, libellant, *v.* Auxiliary Schooner *Liberty*, and numbered 1936 on the civil docket of said court.

In testimony whereof, I hereunto set my hand, and affix the seal of said court, at Boston, in said district, this twenty-third day of March, A. D. 1921.

[SEAL.] JAMES S. ALLEN, *Clerk.*

MEMORANDUM IN SUPPORT OF APPLICATION.

I.

All the jurisdictional questions here suggested have been fully reviewed in a memorandum, to which we ask leave to refer, filed this day in support of a similar application to this court made by the Government in case No. —, original, entitled "In the matter of the petition of the United States of America, owner of the steamship *Western Maid.*" The status of the vessels are different. In the present application, the *Liberty*, then a pilot boat, had been chartered upon the bare boat basis by the Government, pursuant to commandeering powers, and was commissioned as a naval vessel and employed as a dispatch and patrol boat in Boston Harbor during the war period. Such was her status at the time of the collision. At the time the libel was filed, the *Liberty* had been released and redelivered to owners, and then employed by them as a pilot boat. The present application relates to a group of cases, and there are many of them, in which the vessel, privately owned, has been proceeded against by libel in rem, while operating in owner's own service, but to enforce lien liability alleged to have attached to the vessel while under requisition to the Government and then employed by the Government to serve military needs.

II.

It is respectfully submitted that the motion for a writ of prohibition and/or a writ of mandamus should be granted and that a rule should be entered directing the Hon. James M. Morton, jr., Judge of the District Court of the United States for the District of Massachusetts, and the other judges and officers thereof to show cause why the writ of prohibition and/or the writ of mandamus should not issue as prayed for in said petition.

Harry M. Daugherty,
Attorney General of the United States.
William L. Frierson,
Solicitor General.
J. Frank Staley,
Horace T. Atkins,
Special Assistants to the Attorney General.

○

Office Supreme Court, U. S.
FILED
OCT 14 1921
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 22 Original.

IN THE MATTER OF

UNITED STATES OF AMERICA, Chartered owner of the Auxiliary Schooner LIBERTY, for a Writ of Prohibition and/or Mandamus, Petitioner,

AGAINST

HON. JAMES M. MORTON, JR., Judge of the District Court of the United States within and for the District of Massachusetts and the officers of said Court.

RETURN.

L. H. LAMB, Law Printer, 221 High Street, Boston.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 22 Original.

IN THE MATTER OF

UNITED STATES OF AMERICA, Chartered owner of the Auxiliary Schooner LIBERTY, for a Writ of Prohibition and/or Mandamus, Petitioner,

AGAINST

HON. JAMES M. MORTON, JR., Judge of the District Court of the United States within and for the District of Massachusetts and the officers of said Court.

RETURN.

I, James M. Morton, Jr., Judge of the District Court of the United States within and for the District of Massachusetts, for and in behalf of myself and the officers of said court, in obedience to the order to show cause herein, issued out of the Supreme Court of the United States on the 11th day of April 1921, on the petition herein, directing me and the officers of said court to show cause why a Writ of Prohibition should not issue against me and the officers of said court, and why a Writ of Mandamus should not issue against me in accordance with the prayer of the petition, hereby appear, certify and make return as follows:—

Answering Sections 1 to 6 inclusive of said petition, the statements therein are true with the exception that this court is not now proceeding to hear and determine the merits of the libel, having by order of March 11, 1921, suspended all proceedings in the case pending action upon the petition.

Answering Section 7 of said petition, it is respectfully submitted that said auxiliary schooner LIBERTY at the time of the issue and execution of process, was not immune from liability, seizure or arrest, or from maritime lien for said collision damages; that it is immaterial that the petitioner has not consented to suit; and that said court has jurisdiction of the subject matter of the suit, had at the time of issuance and execution of process jurisdiction of the res, and by substitution of the petitioner as respondent in lieu of the res, under 41 Stat. 525, has jurisdiction at present, and has properly exercised its judicial powers to proceed, hear and determine said question.

And having fully answered on behalf of myself and the officers of said court, I respectfully submit that said rule should be dismissed and said writs denied, and that we be hence dismissed.

IN WITNESS WHEREOF, I, James M. Morton, Jr., Judge of the District Court of the United States within and for the District of Massachusetts, for and in behalf of myself and the officers of said court, have hereunto set my hand and the seal of said court this sixth day of September, 1921.

JAMES M. MORTON, JR.,
United States District Judge.

[SEAL OF COURT]

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 22 Original.

IN THE MATTER OF

UNITED STATES OF AMERICA, Chartered owner of the Auxiliary Schooner LIBERTY, for a Writ of Prohibition and/or Mandamus, Petitioner,

AGAINST

HON. JAMES M. MORTON, JR., Judge of the District Court of the United States within and for the District of Massachusetts and the officers of said court.

BRIEF IN OPPOSITION TO THE PETITION.

STATEMENT OF THE CASE.

On December 24, 1917, the steam tug EUREKA, owned and operated by Staples Transportation Company, a corporation engaged in towing and transportation, and having a usual place of business in Fall River in the District of Massachusetts, while bound for the port of Boston in said District having in tow a loaded coal barge, was run into by the auxiliary schooner LIBERTY. The LIBERTY was formerly a pilot boat owned by the Boston Pilots Relief Society, but had been chartered by the United States government upon a bare boat form by virtue of an Act of Congress supplemented by an executive order, and at the time of the collision was manned and operated solely by the United States Navy Department as a guard boat for war service in and about the harbor of Boston. After the Armistice the Navy Department cancelled the charter and redelivered the LIBERTY to her former owners, and she was manned and operated by these owners solely for their own benefit as a pilot boat at the time of the filing of the libel in this case.

Said libel, filed February 5, 1921, by the Staples Transportation Company, owner of the steam tug Eureka, contained a prayer for the usual issuance of process in admiralty *in rem.* Thereupon the United States of America filed, under Sec. 4 of the Act of Congress, approved March 9, 1920 (41 Stat. 525), a suggestion of interest in the litigation, requesting the release of the LIBERTY (apparently under the belief that the vessel had been seized), and assuming all liability for the satisfaction of any decree obtained by the libellant in said cause. After a hearing, orders were made that said suggestion of interest be accepted, that the United States of America be made a party respondent in the action, and that libellant's prayer for warrant of arrest of the LIBERTY be denied.

The United States of America, contemporaneously with this suggestion, filed a further suggestion of interest and plea to the jurisdiction, alleging that by reason of the fact that the LIBERTY at the time of the collision was a vessel belonging to the United States (presumably meaning *pro hac vice*) and was manned and employed by the Navy Department as a guard or dispatch boat in public service for war needs, no maritime lien could arise from the collision, and it was prayed that the libel be dismissed. This plea, after hearing, was adjudged bad, and the prayer for dismissal of the libel was denied.

It is beyond contention that if it be determined that a maritime lien arose out of the circumstances of this case it is enforceable against the LIBERTY after she has been returned to the possession and control of her private owners. Many decisions have established this principle:

United States v. *Wilder*, 3 Sumner 308
The Siren, 7 Wall. 152
The Davis, 10 Wall. 15
Long v. *The Tampico*, 16 Fed. 491
The Luigi, 230 Fed. 493
The Johnson Lighterage Co. No. 24, 231 Fed. 365
The Attualita, 238 Fed. 909
The Carlo Poma, 259 Fed. 369

The sole question presented for the determination of this Court is whether there arose out of this collision a maritime lien against the LIBERTY, which at said time was manned and operated for naval purposes by the United States Government as owner *pro hac vice*.

ARGUMENT.

I. THE BURDEN OF PROVING IMMUNITY FROM THE LIEN IS UPON THE PETITIONER.

Judge Addison Brown in—

Long v. *The Tampico*, *supra*,

wherein a claim was made that a steamer against which a libel for salvage was filed was a foreign public vessel exempt from arrest, states at page 500:

> "In claiming exemption from the ordinary process of the court, the burden of proof is clearly upon the claimant to prove, by competent evidence, all the facts necessary to sustain this defence."

II. THE LIBERTY WAS SUBJECT TO A MARITIME LIEN ARISING OUT OF THIS COLLISION.

It is the contention of the respondent that the Liberty became subject to a maritime lien in favor of said libellant, irrespective of her character, ownership, employment or possession, and that such a maritime lien constitutes a property right of said libellant in the Liberty, *i.e.*, a *jus in re.*

(a) Nature of the Lien.

An early case dealing with maritime liens is

The Bold Buccleugh, 7 Moore, P.C. 267 (1852).

where it was held that a maritime lien arose from a collision of vessels which was enforceable against the offending ship even in the hands of a bona fide purchaser. This case has been a leading case in both England and America ever since. (*The John G. Stevens*, 170 U.S. 113, at 115.) In the same case Chief Justice Jervis said:—

> "A maritime lien does not include or require possession. The word is used in maritime law not in the strict legal sense in which we understand it in courts of common law in which case there could be no lien where there was no possession, actual or constructive. . . . This claim or privilege travels with the thing in whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

An early American case expounding this type of lien is

The China, 7 Wall. 53 (1868),

where it was stated that the vessel's responsibility for torts committed by it is not derived from the law of master and servant or from the common law but from maritime law which impressed a maritime lien upon the vessel in whosesoever hands it might be for torts committed by it, and the vessel was held liable *in rem* for the acts of a compulsory pilot.

In the subsequent case of

Ralli v. *Troop*, 157 U.S. 386,

the Court again referred to its decision in *The China* as follows: —

> "That decision proceeded, not upon any authority or agency of the pilot, or derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo: nor upon the law of contribution in general average as between them; but upon a distinct principle of the maritime law, namely, that the vessel, in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. 7 Wall. 68. As said by Mr. Evarts, in his argument for the libellants, 'This theory treats the faults of conduct in the vessel's navigation as imputable to the vessel itself, and discards as immaterial all considerations touching the adjustment among the navigators, or between them and the owners, of the personal fault or personal responsibility of the misgovernment of the vessel'."

The nature of the lien is well stated in

Briggs et al. v. *A Light Boat*, 7 Allen 287,

where the question was whether a maritime supply lien arose and remained after the government took possession from the builder of a light vessel. The Court says:

> "The word lien as applied to ships or vessels has a

> well-settled and fixed meaning in maritime and commercial law. . . . A maritime lien is not a mere right or remedy by which persons entitled to it can enforce a claim or debt due from the owners against their vessels. It is something more than a *jus ad rem*. It is a *jus in re*, — a right in the nature of a title which when enforced and perfected takes effect and transfers the property in the vessel from the time when the lien first attached. If the government becomes the owner of a vessel by purchase, forfeiture or otherwise, it takes a title subject to the same liens for salvage, wages, bottomry and other claims as would attach to it if sold to private persons. *United States* v. *Wilder*, 3 Sumner, 314. *The St. Jago de Cuba*, 9 Wheat. 416. *The Copenhagen*, 1 C. Rob. Adm. 289."

In

The John G. Stevens, 170 U.S. 113 at 120,

this Court states:

> "The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages."

The origin and development of the personification of the *res* are discussed by Mr. Justice Holmes, in his book on Common Law, pp. 26-34, wherein the author points out:

> "It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical."

Mr. Justice Marshall, in

The Little Charles, 1 Brock. 347, at 354,

which was a case of forfeiture of a vessel under an embargo act, states:

> "This is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner."

Mr. Justice Story, in

The Palmyra, 12 Wheat. 1 at 14,

referring to a seizure in a revenue case states:

> "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing, and this whether the offence be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem* on seizure in the admiralty."

And in

United States v. *Brig Malek Adhel*, 2 How. 210,

Mr. Justice Story again remarked:

> "It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or the personal responsibility of the owner thereof."

See also:

> *The John Fraser*, 21 How. 184, 194
> *The Merrimac*, 14 Wall. 199
> *The Clarita and The Clara*, 23 Wall. 1
> *The Barnstable*, 181 U.S. 464
> *The Luigi, supra*
> *The Johnson Lighterage Co. No. 24, supra*

(b) The Lien Arises though the Vessel be Owned, Manned and Operated by a Sovereign for War Purposes.

An early and instructive case is

> *United States* v. *Wilder*, 3 Sumner 308, 28 F.C. No. 16694 (1838),

where the question was whether a general average lien attached to goods belonging to the United States. Mr. Justice Story says:

> "The sole question in the present case is whether there exists a right of lien for the general average due on goods belonging to the United States. . . . There is no doubt that there does exist a lien on all the goods belonging to all the other shippers . . . The question then is whether a like lien exists in regard to goods belonging to the United States . . . There may, for aught I know, be a just foundation for a distinction, as to liens, between the case of the Government and that of a mere private person in many cases of contract. . . . The present case is not one arising under contract; but by operation of law, and if I may so say, in invitum. . . . It is said, that, in cases where the United States are a party, no remedy by suit lies against them for the contribution (in general average); and hence the conclusion is deduced that there can be no remedy *in rem*. Now I confess

> that I should reason altogether from the same premises to the opposite conclusion. The very circumstance that no suit would lie against the United States in its sovereign capacity, would seem to furnish the strongest ground why the remedy in rem should be held to exist. . . . Otherwise there would be no remedy to compel a submission to the authority of any tribunal or justice; and whether the shipowner should ever receive any compensation or not, and what compensation, would depend upon the good will of Congress after, what is a most lamentable defect in the existing state of things, a protracted appeal, and after many years duration of unsuccessful and urgent solicitations to that body. . . . Finding, therefore, no such exemption from the ordinary lien for general average as the Government seeks to sustain, justified by any general principle, or any authority, I am not bold enough to create one."

So also in

The Davis, 10 Wall. 15 (1869),

it was held that cotton owned by the United States government on board a private vessel was subject to a lien for salvage services.

The Siren, 7 Wall. 152 (1868),

refers directly to the question at issue. This case involved the liability of a prize ship in the possession and control of the United States for an injury inflicted in collision with another vessel. Mr. Justice Field states (p. 185):

> "For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may

> be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose."

In

Workman v. *New York City, Mayor, etc.*, 179 U.S. 552,

which was a suit *in personam*, the late Chief Justice, then Mr. Justice White, at pp. 558 and 559, points out the evil consequences from implanting in the maritime law the doctrine that wrong can be done with impunity. In discussing whether a right of action arose against a municipal corporation, he states (p. 566):

> "The doctrine above stated (immunity of sovereign from suit) rests not upon the supposed want of power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted. In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted."

And at p. 568:

> "The fact that a wrong has been committed by a

> public vessel of the crown affords no ground for contending that no liability arises, because of the public nature of the vessel, although it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given."

Again, in commenting upon the cases holding that a municipal corporation is not liable for an injury inflicted by its fire department he states (p. 572):

> "All these cases but expound the theory of sovereign attribute, which we have seen does not control the maritime law and cannot justify an admiralty court in refusing to redress a wrong where it has jurisdiction to do so."

And again at p. 573:

> "Of course, as has been repeatedly declared by this court, by the general admiralty law of this country, subject to the exemption from process possessed by the national government, a ship, by whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of the master and crew of such vessel."

A number of recent District Court cases maintain the principle that a maritime lien arises irrespective of sovereign ownership, possession or use:

In

The Florence H., 248 Fed. 1012,

a vessel belonging to the United States, chartered by it to the French Government and operated by a French crew, was in collision with a British vessel. Judge Learned Hand, sitting in the District Court for the Southern District of New York, stated:

"The remaining question is whether a lien of collision arose against the ship at a time when she was in the possession of the French Republic and in charge of a French crew. This, it seems to me, is concluded by *The Siren*, 7 Wall. 152, 19 L. Ed. 129. The collision there occurred after capture of a prize, but before condemnation, and it was held that a lien arose in accordance with general principles of admiralty law, regardless of the fact that the United States had both title and possession. It is true that the jurisdiction of the court was there held to depend upon the fact that the United States had had recourse to its own courts for condemnation, sale and distribution of the prize money, but the origin of the lien by necessity antedated any such recourse. As a lien *in rem,* if it arose at all, it arose at the time of the collision, and that did not depend in any sense upon the consent of the United States. While it may be urged that at the time of the collision the title was not in the United States, yet by the subsequent condemnation the title so acquired related back to the time of the capture. At least it was so assumed and agreed in the *Manila Prize Cases*, 188 U.S. 254, 263, 23 Sup. Ct. 415, and such is undoubtedly the law. If so, *The Siren*, *supra*, must be taken as necessarily deciding that a lien of collision arises against a vessel when the title and possession are in the United States; and this was the express ground of the opinion.

But it is said that though a lien of collision may arise against a vessel owned by the United States, this cannot result from the negligence of agents of the United States, to say nothing of agents of the French Republic, without violating the rule that a sovereign is not liable for the wrongful acts of its agents. So far as touches the liability of a vessel of the United States for tortious acts of its agents, the opposite of this contention was in effect settled by *The Siren, supra,* which cannot otherwise stand. The same principle applies to *The Athol,* 1 Wm. Rob. 374. In both cases the ships of the sovereign were held *in rem* for collision due to the negligence of their crews. Furthermore, the decision in *Workman* v. *New York,* 179 U.S. 552, 566, 567, 568, 21 Sup. Ct. 212, put an end to any doubt that in admiralty at least the doctrine did not apply. It is of course true that that case involved, not a sovereign, but a municipal corporation, and there might *a priori* be ground for a distinction between such a party and a sovereign; but the court did not make any such. The opinion, on the contrary, went on the theory that in the admiralty the general rule *respondeat superior,* applied without exception. Mr. Justice White *arguendo* referred to *The Siren, supra,* and *The Athol, supra,* in confirmation of the general applicability of the rule, which could not have been if he had supposed that there was a distinction between corporations, sovereign and municipal.

While this doctrine does not, strictly speaking, reach the case at bar, where the collision occurred through the supposedly wrongful acts of agents of a foreign power, the principle does, upon which it depends, nevertheless, because it is settled in the admiralty that the ship is liable for the tortious acts of any one who lawfully comes in possession of her, and directs her navigation, be he charterer, agent or crew. *The Barnstable,* 181 U.S. 467, 21 Sup. Ct. 684. If *The Florence H.* would have been liable under general principles of maritime law for the negligence of an American crew, it can scarcely be

> supposed that she should not be equally liable for negligence of the crew of any charterer to whom the United States chose to deliver her."

In the above case the vessel was owned by one sovereign and chartered and operated and in the possession of another, and yet the court held that a lien arose from the collision.

Judge Hand re-affirmed his position in

The Gloria, 267 Fed. 929,

which was a collision of said vessel with the steamer Freedom, owned by the United States and a part of the United States Navy, and navigated and manned by officers and a crew of the United States and used solely in the transportation of troops from France to the United States, stating:

> "The cross-libel, though *in rem*, is directed against a vessel which for the present is immune from any possible process of this court, not alone because it is outside the jurisdiction, but because it is a ship owned by and in the possession of the United States. *The Siren*, 7 Wall. 152. It is true that a valid lien has arisen against her if the allegations of the cross-libel be true, and that the lien would survive the transfer of possession by the United States, but for the present the libel hangs in the air. The libellant's motion to declare the ship immune must therefore be granted, if limited to the period of possession by the United States.
>
> The motion to dismiss the cross-libel will be denied. I know of no reason why the cross-libel should be dismissed because the prayer for process cannot at the present time be granted. As I have said, that prayer would be within the power of this court, should

the United States lose possession of the Freedom. This court always has jurisdiction over the subject-matter, however, and may proceed as soon as the arrest becomes legal."

Likewise in

The F. J. Luckenbach, 267 Fed. 931,

Judge Mack in the same court stated:

"Agreeing entirely with the conclusions and the reasoning of Judge Hand in the *Florence H.*, 248 Fed. 1012, and in the decision on motions in Re Steamship Gloria, I hold: . . .

2nd: That while not subject to seizure during its control by the Government, the vessel itself was nevertheless liable *in rem* and subject to a lien therefor, notwithstanding its use as a Government vessel for strictly Governmental purposes at the time of the collision."

In the Eastern District of Pennsylvania, in

The City of Philadelphia, 263 Fed. 234,

Judge Thompson, in holding that a vessel operated by the Railroad Administration was not exempt from a lien for damages caused by her fault, stated, quoting from Mr. Justice Field in

The Siren, supra:

"The doctrine, based upon reasons of public policy, which exempts from seizure a vessel in possession of and operated by the United States for public purposes, does not, however, divest the vessel of the claim or lien of the injured party;"

and further stated:

> "As the claim or lien against the vessel existed as soon as the collision occurred, the fact that the United States still continues in possession does not, either under section 10 of the Railroad Control Act or under the doctrine of public policy, forever bar the right of the libelant to mesne process, but merely postpones and holds it in abeyance during the period of that possession. The prohibition of the statute and the reasons of public policy apply only to the immediate application of the remedy and not to the right of action."

In an earlier case,

> *The Luigi, supra,*

Judge Thompson inferentially took the same position. The Luigi was requisitioned by the Italian Government, and was in Philadelphia to take a cargo for the Italian Government when seized. Her master gave a claim and stipulation in the name of her private owners. It was held that though the vessel could not be seized while in the possession of the Italian Government yet now that she was released and bond given, the court could proceed to enforce the lien. This implies that a lien must have arisen during the requisitioned ownership and possession of the Italian Government.

And in

> *The Western Maid* (Unreported, Eastern Dist. of Penn.),

where the vessel was manned and operated by the United States Navy at the time of the collision and upon return to the United States Shipping Board was arrested in enforcement of the lien arising out of the collision, Judge Thompson held that the court had jurisdiction to enforce the collision lien.

This same question has also arisen in the Maryland District in

The Ceylon Maru, 266 Fed. 396

The offending vessel was a United States vessel manned by a naval crew and engaged at the time of the collision in the transportation of military supplies to the army in France. The same contention was there made as is made in the present case,—that no maritime lien arose. Judge Rose, after briefly reviewing the *Workman* case, stated:

> "The public nature of the service upon which the vessel was engaged at the time of the commission of the tort affords no immunity from liability in admiralty. . . . The language of the Supreme Court is so clear that it does not seem that it is open to two constructions."

And in

The Carolinian, 270 Fed. 1011,

which is a case of collision with a vessel requisitioned by the United States on a bare boat charter, manned by an army crew, used as an army transport, and (like the LIBERTY in the present case) returned before the arrest to her private owner, Judge Rose reaffirmed his opinion that a maritime lien arose and was enforceable when the vessel was in the possession of a party other than a sovereign.

We have therefore within a period of a few years, decisions from four districts, from Massachusetts to Maryland, taking a uniform view that a maritime lien arises irrespective of the ownership, possession or use of the vessel. No recent cases are contra. These cases follow the direction pointed out in the decisions of this Court, and produce that uniformity in the maritime law which the late Chief Justice White in the *Workman* case points out as being so desirable.

(c) The Property of a Sovereign is Not Immune from Pre-existing Maritime Liens.

In

Briggs et al v. *A Light Boat, supra,*

the Court, citing

United States v. *Wilder, supra,*
St. Jago de Cuba, 9 Wheat. 416, and
The Copenhagen, 1 C. Rob. Adm. 289,

says:

> "If the government becomes the owner of a vessel by purchase forfeiture or otherwise, it takes a title subject to the same liens for salvage, wages, bottomry and other claims as would attach to it if sold to private persons."

The same reasons would exist for the cancellation of pre-existing liens as for the prohibition of the creation of liens, and yet the government has always accepted title to property acquired by it with the liens attached, and has never raised any question of its immunity therefrom.

(d) The Petitioner has Assumed the Creation and Existence of a Lien as Against a Lesser Sovereign.

In

Oyster Police Steamers of Maryland, 31 Fed. 763,

a steamer owned and operated by the sovereign State of Maryland had violated the rules of the United States Local Inspectors of steam vessels. The United States government held the steamer subject to the lien penalties the same as though privately owned and operated. It is, we submit, inequitable for a sovereign to assume a lien to exist as against the property of another sovereign while denying a similar privilege against itself.

(e) The Petitioner by Act of March 9, 1920 (41 Stat. 525), has Impliedly Admitted that a Lien may be Created Upon Vessels Owned and/or Operated by it.

This Act aims to relieve the government from the inconvenience and embarrassment attendant upon physical seizure of its commercially operated vessels, forbids all seizure of its vessels within its jurisdiction, provides for relief of its vessels seized in foreign ports and for release of vessels seized in the possession of other parties upon claims originating during government operation, the latter apparently irrespective of the character of the use in which the vessel is engaged. The Act neither expressly nor by implication denies the creation of a maritime lien upon a government vessel. On the other hand it impliedly assumes that such a lien may be created.

Congress could easily have forbidden in Sec. 1 of the Act, had it so intended, the creation of a lien as well as the seizure of the vessel. Instead, however, it specifically permits suit to be prosecuted upon the theory *in rem* (Sec. 3); it provides for the release of vessels seized in foreign ports in the enforcement of maritime liens (Sec. 7), and in Sec. 4, under which the United States government has intervened in the present case, it provides for the release of a vessel seized in private hands upon a claim having its origin under government operation. This section assumes that a lien had been created during the government possession, ownership or operation, and that the vessel had been seized in the enforcement thereof. This latter section is not confined to vessels used commercially.

If the petitioner's contention is correct that no lien can be created by the government vessel, then Sec. 4 has no reason for its existence. The petitioner by adopting this section in its suggestion accepts the respondent's theory of the case.

III. ENGLISH CASES DISTINGUISHED.

In England, immunity attaches to all property owned by the crown, irrespective of whether or not it is in possession of the sovereign.

> *The Broadmayne*, L.R. (1916), P.D. 64
> *The Scotia* (1903), L. A. C. 501

The above rule, which taken literally appears harsh, is more rigorous in theory than in practice, for in England the Lords Commissioners of the Admiralty represent the crown, and have a discretionary power freely exercised, to waive the privileges of the crown and consent to jurisdiction.

> *The Fidelity*, 16 Blatch. 569, F.C. 4758
> *U.S.* v. *N.Y. Oriental S.S. Co.*, 216 Fed. 61, 67
> *Thomson Nav. Co.* v. *City of Chicago*, 79 Fed. 984

In

> *The Siren, supra,*

this Court said (page 155):

> "In England, when the damage is inflicted by a vessel belonging to the crown, it was formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel *in rem*, upon which the court directs the registrar to write to the lords of the admiralty requesting an appearance on behalf of the crown—which is generally given—when the subsequent proceedings to decree are conducted as in other cases."

And in

The Davis, supra,

this Court points out that by reason of the difference in the essential character of the two governments, the English rule in practice prevents gross injustice being done. The Court says:

> "The liberal exercise of its authority removes the difficulty presented here, where no power to do this exists in any officer of the Government, and prevents any apprehension of gross injustice in such cases in England."

As the Court points out in the above case, in the United States no power exists in any officer of the federal government to confer jurisdiction over the subject matter upon any of the federal courts. (See also *United States* v. *N. Y. & Oriental S. S. Co., supra.*)

The situation to which Judge Story refers in

United States v. *Wilder, supra,*

that:

> "Whether the ship-owner should ever receive any compensation or not, and what compensation, would depend upon the good will of Congress after, what is a most lamentable defect in the existing state of things, a protracted appeal, and after many years duration of unsuccessful and urgent solicitations to that body"—

is as true today as it was in 1838.

If, therefore, the courts of this country should follow the English rule as to immunity from lien of property belonging to the sovereign, we should feel here the rigor of the rule without the alleviation of the liberal English practice referred to above. As this court said, speaking through Mr. Justice Miller, in

United States v. *Lee*, 106 U.S. 196, at 208:

> "But little weight can be given to the decisions of the English courts on this branch of the subject. . . ."

and in

Homer Ramsdell Co. v. *Comp. Gen. Trans.*, 182 U. S. 406,

where, after referring to some English authorities, Mr. Justice Gray said:

> "There is no occasion to refer further to the English cases in admiralty, because in England it is held that the ship is not responsible in admiralty where the owner would not be at common law, differing in this respect from our own decisions."

Furthermore, the personification of the *res* is not carried so far in England as in the United States. In the former the procedure *in rem* is used merely as a means to compel the appearance of the respondent, and judgment runs against the individual, —the seizure of the *res* is incidental.

The Parlement Belge, 5 P. D. 197

IV. THE AUTHORITIES DO NOT UPHOLD THE CONTENTION OF THE PETITIONER THAT NO MARITIME LIEN AROSE FROM THE COLLISION.

The Government cites in support of its petition

Kawananakoa v. *Polyblank*, 205 U.S. 349 at 353
The Fidelity, 8 Fed. Cas. No. 4758
The Parlement Belge, 4 Asp. M.C. at 234 and 241
The Prins Frederik, 2 Dod. 451
Board of Commissioners v. *O'Conner*, 86 Ind. 531, 537
Rowley v. *Conklin*, 89 Minn. 172 at 175
Briggs v. *Light Boat*, 7 Allen 287, at 297

Of these cases that of *Kawananakoa* v. *Polyblank* is a decision on the general principle of immunity of a sovereign from a suit *in personam*, and is undoubtedly well settled law.

The Parlement Belge is a case of a Belgian mail packet owned and in the possession of the king of Belgium. The court holds that the sovereign cannot be sued nor his property attached, and in a review of the authorities discusses whether a maritime lien attaches. It intimates in *obiter dicta* that a lien would not arise, but this is not decided, in fact is not material; for under the facts of this case the boat was at the time of the service of process and in all previous times, owned and in the possession of the sovereign, and the court merely held that she could not be seized, and that would also be the well-settled American view. The intimations in the case relative to a maritime lien should be considered in connection with the English practice, which, as before stated, is harsh in theory, but is alleviated in practice by a policy of submission to jurisdiction which is foreign to our system of government.

The Prins Frederik was a claim of salvage against a ship of war of Holland for services performed by the British brig Howe. To be sure, as stated in the petitioner's brief, the king's advocate argued that the Prins Frederik was immune in a civil suit by individuals the same as if she were a ship of war belonging to the British government; *but its brief neglects to state that the court apparently ignored this argument and allowed a recovery of £800.*

Board of Commissioners v. *O'Conner* is the case of a mechanic's lien in the construction of a county court house.

Rowley v. *Conklin* is another case of a state statutory lien in which it was held that no laborer's lien arose for work on logs belonging to the state.

In *Briggs et al.* v. *A Light Boat*, under a contract to build light vessels for the United States in which no title passed until completion and delivery, it not only was held that a lien arose for supplies furnished, but the court further held that when the boat was turned over to the government the government took it subject to the lien.

The petitioner therefore cites only three cases holding that no lien is created. Two are State decisions of Indiana and Minnesota, which have reference solely to statute mechanic's liens which are enforced in the common law courts, and are not analogous to maritime liens; the third is *The Fidelity.* In that case a libel was filed by the owner of a canal boat *in rem* against the tug Fidelity to recover damages for the stranding and sinking of the canal boat through the alleged negligence of the tug. The latter was seized under process. The Municipal Corporation of New York entered a claim as owner of the tug. The latter was engaged solely in the business of the municipal corporation Blatchford, J., held, 9 Ben. 333, F.C. 4757, that on the ground of public policy the tug could not be seized while so used, stating:

> "A lien may exist and the court where it has control of the res in a proper manner may enforce the lien upon it, but it will not enforce the lien upon the res where in order to obtain such control and sustain the proceeding the possession of the governmental authority must be invaded under the process of the court. The latter is the present case."

The case was appealed (See 16 Blatch. 569, F.C. 4758), and Mr. Chief Justice Waite held that the tug was not liable, intimating that no maritime lien upon the vessel could arise from the negligent acts of the vessel while being operated by the government, but Mr. Chief Justice Waite was deciding a case where a tugboat at the time of the seizure was not only owned by a municipal corporation but was actually in use by its Commissioners of Public Charities and Correction in transporting prisoners, carrying sick persons, etc. His decision is undoubtedly correct, that the tug should not be seized while in the possession of the municipal corporation and so used. It is contra to Judge Blatchford, and *obiter dicta* for Mr. Chief Justice Waite to say that no maritime lien could arise. It was sufficient for him to have held that no lien could be enforced. Furthermore, Mr. Chief Justice Waite seems to have reached his conclusion from the analogy of State mechanic's liens and on the theory that public property devoted to public uses was exempt from seizure and sale under execution. It seems, however, that public property is well protected by the rule that it cannot be seized in the enforcement of a lien and that it is unnecessary to go to the extreme of denying the lien. The views of Mr. Chief Justice Waite were at the time contrary to those of this Court, and have since been expressly repudiated by this Court in

> *Workman* v. *New York City, Mayor, etc.*, 179 U.S. 552,

wherein Mr. Justice White, referring to *The Fidelity*, states:

> "True also, where admiralty process has been set in motion against a municipal corporation, public policy, it has been held, restrains a seizure of property used for public purposes by such corporation. *The Fidelity*, 16 Blatchf. 569, Fed. Cas. No. 4758. This conclusion, however, is but the application of the exception as to the mode of execution of a judgment or decree against such a corporation, to which we have referred, and its existence in the admiralty law in all cases has also been denied. *The Oyster Police Steamers of Maryland*, 31 Fed. Rep. 763. Which

> of these conflicting conclusions, as to the exception in question is correct we are not called upon on the present record to determine, since no levy of process upon the fire-boat was made or attempted to be made."

The Court then proceeds to adopt the theory, as heretofore quoted, that the lien arises irrespective of public ownership and control; and Judge Rose, referring to both of these cases says in

The Ceylon Maru, 266 Fed. 396:

> "On her behalf it is now argued that no liability *in rem* ever attaches to a ship belonging to the government for anything she does while in its public service. What Chief Justice Waite said, while on circuit, in *The Fidelity*, 8 Fed. Cas. 1189, No. 4,758, fully sustains this contention. But the Supreme Court in *Workman* v. *New York City*, 179 U.S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, explained that what was decided in that case was merely the application of the exception to the mode of execution of a judgment or decree against a municipal corporation, and then went on to say that in the admiralty law the existence of that exception in all cases had been denied, citing a case from this district. *Oyster Police Steamers of Md.* (D.C.) 31 Fed. 763."

And he repeats these statements in

The Carolinian, 270 Fed. 1011

It is seen therefore that the *obiter dicta* in *The Fidelity*, upon which the case of the Government rests, has not only not been accepted, but has been expressly repudiated by this Court.

CONCLUSION.

The respondent therefore respectfully submits that the well established principles of *in rem* procedure be allowed to remain unchanged, and that in the present case it be determined that out of said collision between the tug Eureka and the auxiliary schooner Liberty there arose a property right, *i. e.*, a maritime lien, which attached to the Liberty in favor of the owner of the Eureka; that this right was suspended in its enforcement while the Liberty was in the possession of the United States government, but became enforceable when the Liberty was re-delivered to the hands of her former owners; and that thereafter said auxiliary schooner Liberty was subject to seizure and arrest. The respondent respectfully submits that the rule should be discharged and the writs denied.

EDWARD E. BLODGETT,
FOYE M. MURPHY,
Proctors for Respondent.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. ———. ORIGINAL.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA, FORMER REQUISITIONED AND CHARTERED OWNER OF THE AMERICAN STEAMSHIP "CAROLINIAN."

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

And now comes Harry M. Daugherty, Attorney General of the United States of America, former requisitioned and chartered owner of the steamship *Carolinian* and moves:

1. For leave to file the petition for a writ of prohibition and/or a writ of mandamus, hereto annexed, and

2. That a rule be entered and issued directing the District Court of the United States for the District of Maryland and the Honorable John C. Rose, judge thereof, and the officers of said court to show cause why a writ of prohibition and/or a writ of mandamus should not issue against them and each of them, in accordance with the prayer of said peti-

tion, and why the United States of America should not have such other and further relief therein as may be just.

HARRY M. DAUGHERTY,
Attorney General of the United States,
For the Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. ——. ORIGINAL.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA, FORMER REQUISITIONED AND CHARTERED OWNER OF THE AMERICAN STEAMSHIP "CAROLINIAN," FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS, AGAINST THE HONORABLE JOHN C. ROSE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE OFFICERS OF SAID COURT.

PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Harry M. Daugherty, Attorney General of the United States, on behalf of the United States of America, former requisitioned and chartered owner of the American steamship *Carolinian*, against the Honorable John C. Rose, judge of the District Court of the United States for the District of Maryland, sitting in admiralty, and against the officers of said court, respectfully represents:

First. That on July 9, 1920, F. E. Richards, as liquidator of the Steamship Treganna Company (Ltd.) owner of the British steamer *Mavisbrook*, filed a libel in the District Court of the United States for the District of Maryland, against the American steamship *Carolinian*, to recover damages in the sum of $20,000, alleged to have been sustained as a result of a collision between the *Mavisbrook* and the *Carolinian*, on the 15th day of February, 1918, in the harbor of Brest, France, and prayed that process issue for the seizure, arrest, and attachment of the said steamship, according to the course and practice of said court, and that said vessel be condemned and sold to pay said collision damages. A copy of the libel, as part of the record of proceedings in said court, is hereto annexed.

Second. That theretofore the steamship *Carolinian* had been requisitioned by the United States, upon the bare boat basis, under and by virtue of the authority of the emergency shipping legislation, Act of Congress June 15, 1917 (39 Stat. 728, 730), and was a vessel belonging to the United States. That at the time of the collision, the United States commissioned her as an Army cargo transport and employed her to serve military needs in war service. That, subsequently, the *Carolinian* was released from requisition and redelivered to her owners, who then employed her in merchant service, in which service the steamship was engaged at the time of the filing of the said libel and her attachment thereunder.

Third. That thereafter, by virtue of the authority of section 4 of the act of Congress entitled "Suits in admiralty act," approved March 9, 1920 (41 Stat. 525), the United States filed its suggestion that it was interested in such proceedings, desired the immediate release of the steamship *Carolinian* from arrest or attachment without bond or stipulation, and that it assumed the liability for the satisfaction of any decree entered therein. Thereupon the said district court directed the release of the said steamship from attachment without bond or stipulation.

Fourth. That thereafter, Robert R. Carman, the United States attorney for the District of Maryland, specially appearing on behalf of the United States for the purpose of questioning the jurisdiction of said court to proceed in said cause, filed of record suggestions that inasmuch as the *Carolinian*, at the time of the collision, was a vessel belonging to the United States, employed by its War Department as an Army transport to serve military needs, she was immune from liability or lien for collision damages, and the court was without jurisdiction to proceed against the vessel or to hear and determine the matters alleged in said libel. Copy of said suggestion, as part of the record of proceedings in said court, is hereto annexed.

Fifth. That thereafter the matter came on for hearing before the Honorable John C. Rose, judge of said court, upon the right of said court to assume jurisdiction or otherwise to hear and determine the matters alleged in said libel, who handed down an opinion in which, while finding the *Carolinian* at the time of the collision was a vessel belonging to the United States and employed as an Army cargo transport to serve military needs, nevertheless overruled the Government's suggestion and assumed jurisdiction, and is proceeding to hear and determine the merits of the libel. Copy of said opinion, as part of the record of proceedings in said court, is hereto annexed.

Sixth. That a certified copy of the record of proceedings in said District Court of the United States for the District of Maryland, filed in the said cause, is hereto annexed and made a part hereof.

Seventh. That it is now represented that inasmuch as at the time of the collision the *Carolinian* was a commissioned Army transport employed by this sovereign petitioner to serve military needs, she was immune from liability or lien for said collision damages. Further, that said libel proceedings, in substance and effect, is an action against your sovereign petitioner and presents a claim for tort arising out of a collision alleged to have resulted from the incompetence or want of skill of Army officers commissioned to man and operate an Army transport, and that for the liability of such losses this sovereign petitioner has not consented to suit. By reason thereof the said District Court was, and is, without jurisdiction to proceed to hear and determine the matters alleged in said libel in rem filed against said steamship.

Wherefore the said Harry M. Daugherty, Attorney General of the United States, the aid of this honorable court, respectfully requesting, prays—

1. That a writ of prohibition may isssue out of this honorable court to the said Honorable John C. Rose, judge of the United States District Court for the District of Maryland and/or the officers of said court, prohibiting him and them from taking any step whatsoever in the cause aforesaid, and, generally, from the further exercise of jurisdiction therein or the enforcing of any order, judgment, or decree made under color thereof.

2. That a writ of mandamus be issued out of and from this honorable court directing and commanding the Honorable John C. Rose, judge of the District Court of Maryland to vacate the order so entered by him overruling the Government's exception to jurisdiction, and to enter an order in said cause declaring the said steamship *Carolinian* immune from liability or lien for said collision damages.

3. That the court grant to the United States of America such other and further relief as may be just in the premises.

HARRY M. DAUGHERTY,
Attorney General of the United States of America.

I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

HARRY M. DAUGHERTY.

Subscribed and sworn to before me this 25th day of March, 1921.

JULIA B. RISHEL,
(Seal.) *Notary Public, District of Columbia.*

TRANSCRIPT OF RECORD IN THE DISTRICT COURT.

LIBEL.

UNITED STATES OF AMERICA,

District of Maryland, to wit:

At a District Court of the United States for the District of Maryland, begun and held at the city of Baltimore on the first Tuesday in March (being the first day of the same month), in the year of our Lord 1921.

Present: The honorable John C. Rose, judge, Maryland district; Robert R. Carman, Esq., attorney; William W. Stockham, marshal; Arthur L. Spamer, clerk.

Among other proceedings were the following, to wit:

F. E. Richards *v.* Steamer *Carolinian*, libel in a cause of collision, civil and maritime. No. 656 Admiralty Docket.

Filed 9 July, 1920.

To the honorable the judges of the United States District Court for the District of Maryland:

The libel of F. E. Richards as liquidator of Steamship Tregenna Co. (Ltd.), owner of the steamer *Mavisbrook* against the steamer *Carolinian*, her engines, boilers, etc., and against all persons lawfully intervening for their interests therein, in a cause of collision, civil and maritime, alleges upon information and belief as follows:

First. At all the times herein mentioned the Steamship Tregenna Co. (Ltd.) was and still is a company of limited liability organized under the Kingdom of Great Britain, and the owner of the steamer *Mavisbrook;* that said company is now in liquidation and that your libelant is the duly appointed and authorized liquidator thereof, with authority to prosecute and collect all outstanding claims thereof.

Second. On the 15th day of February, 1918, the said steamer *Mavisbrook* was lying properly anchored in the harbor of Brest, France, being laden with a cargo of lumber and about to sail from that port to Bordeaux. The steamer *Carolinian* was moving about in the said harbor, and while the *Mavisbrook* was lying properly anchored as aforesaid, the steamer *Carolinian* ran into and collided with the *Mavisbrook* striking her with the *Carolinian's* stem on the port side of the *Mavisbrook* abreast her main rigging.

Third. The said collision was not due to any fault or neglect on the part of the steamer *Mavisbrook* or those in charge of her, but was due solely to the fault and negligence of the steamer *Carolinian* and those in charge of her, in the following particulars, among others, which will be pointed out at the trial:

1. In that she failed to keep a proper lookout;
2. In that she was not in charge of competent persons;
3. In that she unnecessarily navigated across the anchorage grounds;
4. In that as the moving vessel she failed to keep clear of the *Mavisbrook* which was lying at anchor;
5. In that she tried to pass too close to the *Mavisbrook* and failed to allow for the effect of tides, winds, and currents;
6. In that she failed to steer herself aright or to reverse her engines at the proper

time, or to take any other due or adequate means to avoid the collision.

Fourth. By reason of the premises the steamer *Mavisbrook* and her owners sustained damage, as nearly as the same can be estimated at present, of about $20,000, no part of which has been paid, although duly demanded.

Fifth. The steamer *Carolinian* is now, or soon will be, within the port of Baltimore and within the jurisdiction of the United States and of this honorable court.

Wherefore, the libelant prays that process in due form of law in accordance with the practice of this court in cases of admiralty and maritime jurisdiction may issue against the steamer *Carolinian*, her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer the matters aforesaid, and that the libelant may have a decree for the damages sustained by it as aforesaid, together with interest and costs, and that the steamer *Carolinian*, her engines, boilers, etc., may be condemned and sold to pay the same, and that the libelant may have such other and further relief as may be just.

Haight, Sandford, Smith and Griffin,
Brown, Marshall, Brune and Parker,
Proctors for Libellant.

State of Maryland, *City of Baltimore, to wit:*

W. Ainsworth Parker, being duly sworn, deposes and says: That he is one of the proctors for the libelant; that he is authorized to make this affidavit; that he has read the foregoing libel; that to the best of his knowledge, information, and belief all statements thereof are true; that he acquired such knowledge of the facts therein set forth from statements of libelant, its agents and servants; that the libelant is not now in the United States.

W. AINSWORTH PARKER.

Subscribed and sworn to before me this 9th day of July, 1920.

[SEAL.] ADDIE B. DEERING,
Notary Public.

SUGGESTION OF UNITED STATES FOR RELEASE OF VESSEL.

Filed July 21, 1920.

In the District Court of the United States for the District of Maryland, in Admiralty. F. E. Richards, as liquidator of the steamship Tregenna Co. (Ltd.), owner of the steamship *Mavisbrook v.* steamship *Carolinian.*

To the honorable, the judge of said court:

The United States suggests to the above-named court that the steamship *Carolinian* is a privately owned vessel not in the possession of the United States or of any corporation in which the United States or its representatives owns the entire outstanding capital stock; and that said steamship *Carolinian* has been arrested or attached upon a cause of action alleged to have arisen from previous possession, ownership, or operation of said steamship by the United States or by such corporation.

The United States further suggests that it is interested in the above-entitled cause; that it desires the immediate release of said steamship *Carolinian* from said arrest or attachment without bond or stipulation therefor; and that the United States assumes the liability for the satisfaction of any decree obtained by the above-named libellants in the above-entitled cause.

By direction of the Attorney General of the United States.

ROBERT R. CARMAN,
United States Attorney.

Upon the foregoing suggestion, it is ordered this 21st day of July, 1920, that the steamship *Carolinian* be and the same is hereby released.

JOHN C. ROSE,
District Judge.

SUGGESTION OF UNITED STATES FOR DISMISSAL OF LIBEL.

Filed 6 January, 1921.

In the District Court of the United States for the District of Maryland, in Admiralty. F. E. Richards, as liquidator of the Steamship Tregenna Co. (Ltd.), owner of the steamship *Mavisbrook, v.* steamship *Carolinian.*

Now comes Robert R. Carman, United States attorney for the district of Maryland, as proctor for the Government of the United States of America, chartered owner of the steamship *Carolinian,* at the time of the collision stated by the libel filed herein, and appears specially to suggest to the court that, at the time of the said collision, February 15, 1918, the steamship *Carolinian* had been requisitioned by the Government of the United States, upon the bare-boat basis, copy of which bare-boat charter is filed herewith and prayed to be taken as part hereof, by virtue of the authority of the act of Congress of June 15, 1917, and the executive order of July 11, 1917, issued pursuant thereto, and that thereby the said steamship *Carolinian,* at the time of the happening of said collision, was a vessel belonging to the United States.

That at the time of said collision, said steamship *Carolinian* had been assigned to the War Department of the United States and was employed by it as an Army transport, then being manned by and through an Army crew furnished by the War Department of the United States. That after said collision the War Department released said steamship from requisition and canceled her requisition charter and redelivered the vessel to her owners, and at the time of the filing of the libel herein said steamship was employed by her owners in their own service.

Further, it is suggested that as the said steamship *Carolinian* at the time of said collision was a vessel belonging to the United States and employed in public service for war needs, no liability by reason of said collision was created which survives or becomes enforcible against the said vessel upon her redelivery from public service to her owners, as aforesaid. That there is now no collision claim enforcible in rem against the said steampship *Carolinian.*

Wherefore the United States prays that this court declare that there is no right in the libellant herein to maintain said libel in rem against said steamship to recover its collision damages, and that the said libel be dismissed with costs.

Robt. R. Carman,
United States Attorney.

United States of America,
District of Maryland, to wit.

Now comes Robert R. Carman, United States attorney for the District of Maryland, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing answer are true to the best of his knowledge, information, and belief.

Subscribed and sworn to before me this 6th day of January, 1921.

CHAS. W. ZIMMERMANN,
Chief Deputy Clerk of the District Court of the United States for the District of Maryland.

REQUISITION CHARTER.

[United States of America. U. S. S. B. Charter, Form No. 2.]

Name of steamship: *Carolinian.*

Type of steamship: Cargo.

D. W. tonnage: 6,975, subject to correction.

Gross tonnage: 4,170.

Passenger capacity: None.

Knots per hour: Average 9.

Date on which vessel entered into pay: August 23, 1917, 12 noon.

This requisition charter made and concluded upon in the District of Columbia the 28th day of December, 19—, between Garland Steamship Corporation, of ———, of New York, owner of the good American single-screw steamship *Carolinian*, of New York, of 4,170 tons gross register and 2,707 tons net register, built in West Hartlepool, England, having engines of 325 nominal horsepower, provided with proper certificate for hull and machinery, and classed 100 A-1 at British Lloyds, of about 348,319 cubic feet capacity and 6,975 sub. to correction tons dead-weight capacity, summer freeboard, inclusive of permanent bunkers, capable of making an average voyage speed when loaded of 9 knots an hour, under ordinary conditions, on a consumption of about 27 tons of coal, or about ——— barrels of oil, per 24 hours; and the United States of America, through the United States Shipping Board—

Witnesseth:

Whereas by requisition order, dated August 22, 1917, pursuant to the urgent deficiency act of June 15, 1917, and the President's Executive order of July 11, 1917, the United States has requisitioned the use of the steamship *Carolinian*, and the steamship has been delivered into possession of the United States pursuant to the requisition; and

Whereas it is desired by the United States and by the owner to fix the compensation (hereinafter called hire) which the United States shall pay to the owner for use of the steamship so requisitioned, and to define by agreement the rights and duties of the United States and of the owner with respect to the operation of the vessel under the requisition, and with respect to other matters in connection therewith:

Now, therefore, it is agreed as follows:

First. The terms and conditions under which the vessel is to be operated shall be those contained in the "Time Form" hereto annexed; provided, however, that at the time of the requisition or at any time thereafter, on five days' written notice, the United States may operate the vessel under the terms and conditions contained in the bare-boat form hereto annexed, such operation to begin when the steamship is in a United States port.

Second. In consideration of the compensation provided and the other obligations assumed by the United States hereunder, the owner accepts this requisition charter in full satisfaction of any and all claims he has or may have against the United States arising out of the requisition and accepts the compensation herein provided for as the just compensation requiaed by law; provided, however, that the acceptance of this requisition charter shall be without prejudice to the claim, if any, the owner may have against the United States arising out of recoveries against the owner by third parties on the vessel's commitments.

Third. Upon giving five days' written notice to the owner the United States may at any time, when the vessel is in a United States port, cancel this requisition charter without prejudice to the accrued rights of either party.

GARLAND STEAMSHIP CORPORATION, *Owner.*
By G. G. ALLEN.
THE UNITED STATES SHIPPING BOARD,
By E. F. CARRY.

Witness the signature of—
(Sgd.) [Illegible.]
Witness to the signature of—
(Sgd.) [Illegible.]

TIME FORM.

Whereas the United States has determined to deliver possession of the vessel to the owner to be operated by the owner for the United States;

Now, therefore, it is agreed as follows:

PERIOD OF SERVICE—VESSEL TO BE COMPLETELY EQUIPPED AND FIT—MAKING GOOD DEFECTS.

First. The steamship shall remain in the service of the United States under the requisition order to be employed as and where the United States may from time to time determine and for such period of time as the United States may determine, but such period shall not extend beyond the first arrival of the steamship in an American port six months after peace is declared unless she shall be required for Government purposes. The vessel, when placed at the disposal of the United States, as directed by it, shall be or shall forthwith be made by and at the expense of the owner tight, staunch, strong, and well and sufficiently tackled, appareled, furnished, outfitted, and equipped, and in every respect seaworthy and in good running order and condition; and shall be fit for the service in which she has usually been employed, having on her delivery United States inspection certificate that she has met all requirements to fit her for the trade in which she is employed at the time of the requisition, except that no such certificate shall be required if she be a foreign-built vessel not at present subject to the United States steamboat-inspection laws as provided in the Panama Canal act, as amended August 18, 1914, and having a full complement, including the master, officers, and crew, for a vessel of her tonnage. Any deficiency in these respects must be remedied forthwith by and at the expense of the owner, and any time lost in remedying any such deficiency is not to be paid for by the United States.

OPERATION OF VESSEL, WAGES, ETC.—SPECIAL EQUIPMENT—COMPLEMENT OF VESSEL.

Second. The owner shall operate the vessel for the United States, shall provide and pay for all provisions, wages, bonuses, and consular shipping and discharging fees of the master, officers, and crew, and shall provide and pay for all cabin, deck, engine-room, and other necessary stores, and shall maintain the steamship in a thoroughly efficient state in hull and machinery, tackle, apparel, furniture, and equipment during the service. If the service requires any special equipment in addition to that required for the vessel's previous usual service, such equipment shall be provided and paid for by the United States. The ordinary crew as required by law to operate the vessel overseas and in trans-Atlantic service shall be considered a full complement, and any extra men, such as wireless operators, armed guards, or others, not required by law for ordinary merchant overseas and trans-Atlantic service, shall be paid for by the United States. The owner shall, however, provide proper subsistence for such extra men at reasonable rates to be fixed by the United States.

STATUS OF VESSEL.

Third. The vessel, while being so operated by the owner, shall not have the status of a public ship, and shall be subject to all laws and regulations governing merchant vessels, and the owner shall take all proper steps to prevent any suit or process from interfering with her service.

WHEN A PUBLIC SHIP.

When, however, the requisitioned vessel is engaged in the service of the War or Navy Department, the vessel shall have the status of a public ship, and although the owner shall continue to provide and pay for all the items stated to be provided, and paid for by the owner while operating the vessel as provided in clause "Second," the master, officers, and crew shall become the immediate employees and agents of the United States, with all the rights and duties of such, the vessel passing completely into the possession and the master, officers, and crew absolutely under the control of the United States. The owner, master, officers, and crew shall be notified of the commencement and termination of the vessel's employment in the service of the War or Navy Department, and a proper notation shall be made on the ship's articles prior to the signing thereof, showing that the master, officers, and crew have entered into the service of the United

States. Monthly, or as soon as possible after the termination in a United States port of any voyage in the service of the War or Navy Department, the owner shall furnish the United States as a voucher a statement by the United States Shipping Commissioner which shall certify the dates and amounts of the payment of the wages and bonuses of the master, officers, and crew as the same appear on the completed articles.

NATIONALITY OF CREW.

Fourth. So far as practicable, every member of the crew shall be an American citizen, citizens and subjects of enemy or ally of enemy nations always excluded. Full list of crew, with their ratings and nationalities, shall, if required, be produced to the United States at the time of the delivery of the vessel or on the entry into the pay of the vessel of such member or members of the crew.

UNITED STATES WILL PROVIDE FUEL, ETC.

Fifth. The United States shall provide and pay for all coals or other fuel, fresh water, port charges, pilotages, agencies, commissions, brokerage, wharfage, and consular charges (except those pertaining to the master, officers, and such part of the crew as the owner is responsible for under clause "Second"), and all other usual expenses paid by charterer under so-called "Government form time charter," except as otherwise provided. The United States shall reimburse the owner for all income or excess-profits taxes in foreign countries upon income or profits derived from the vessel and accruing to the United States.

DUNNAGE.

Sixth. The United States shall provide the necessary dunnage and shifting boards, but the owner shall allow the United States the use of dunnage and shifting boards already on board the steamship, the United States to have the privilege of using the shifting boards for dunnage, but making good any damage thereto.

FUEL ON DELIVERY AND REDELIVERY.

Seventh. The United States shall accept and pay for all fuel on board at the time of delivery under the requisition order, and the owner shall on the redelivery of the steamship pay for all fuel left on board at the current market price at the respective ports of delivery and redelivery. A statement of such fuel shall be furnished forthwith by the owner to the United States for verification.

PAYMENT OF HIRE.

Eighth. The United States shall pay for the use of the steamship at the monthly rate which shall from time to time be established by the United States Shipping Board for a vessel of her description, commencing on and from the hour that she shall be ready for delivery under the requisition (and is so reported to the United States) and at and after the same rate for any part of a month, hire to continue until the hour at which the vessel may be ready for redelivery at a United States port (and is so reported to the owner).

If the United States Shipping Board shall hereafter lower the rate of hire from that in effect on the date of the requisition, the owner shall have the option of canceling this requisition charter as of the date of such reduction, without prejudice to the rights of either party.

Payment of hire shall be made in the District of Columbia, in cash, monthly, as earned, at the end of each calendar month. If the vessel is lost, hire shall be paid up to and including the date of her loss (if the time of her loss be uncertain, then up to and including the date she is last heard from).

DEAD-WEIGHT TONNAGE.

Dead-weight tonnage shall be based on summer freeboard assigned or to be assigned with reference to North Atlantic service, according to the standards of any recognized classification society; proper evidence of such assignment, together with a true copy of the dead-weight scale of the vessel, shall, if possible, be furnished by the owner. Until reasonable opportunity has been afforded the owner to procure such assignment, hire shall be paid on dead-weight tonnage as certified by the owner; any excess or deficiency in such hire to be adjusted upon subsequent determination of summer freeboard.

CLASSIFICATION.

Ninth. A certified statement from a recognized classification society that the vessel has been classed as fit for her previous usual service shall, if obtainable at a reasonable cost, be furnished by the owner. Any alterations which are made to obtain a class for North Atlantic service which are not required to obtain a class for the vessel's previous usual service shall be made by and at the expense of the United States, but there shall be no deduction from the hire for time consumed in making such alterations. So far as the exigencies of the service will permit, the owner shall do all things necessary to maintain the vessel's class.

INCREASE IN CREW'S WAGES AND BONUSES.

Tenth. In addition to the aforesaid compensation for use of the steamship, the United States agrees to reimburse the owner for any proper increases in wages and bonuses over the standard prevailing August 1, 1917, for master, officers, and crew, the owner to produce satisfactory evidence of such increases in wages or bonuses.

INVENTORY OF OUTFIT.

Eleventh. The United States shall have the use of all outfit, equipment, and appliances without extra cost, and the same or their substantial equivalent shall be returned to the owner when the vessel is redelivered in the same or as good order and condition as when received, ordinary wear and tear and damage due to the operation of risks assumed by the owner excepted. An inventory shall be furnished forthwith by the owner to the United States for verification.

INSURANCE OF VESSEL.

Twelfth. The owner shall assume the marine risks, including collision liabilities (excepting losses and liabilities arising from war risks). The United States shall assume war risks (including collision liabilities), as excluded by the following clause in the American hull policy, 1916 form: "Warranted free of capture, seizure, arrest, restraint, or detainment, or the consequences thereof, or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war."

When, however, the requisitioned vessel is used upon voyages different from those from which she has been taken and for which she was intended, and by reason thereof the owner is compelled to pay an excessive premium in the new service in which she is engaged as compared with other vessels in such service of approximately the same age, class, and value, the facts may be shown to the United States Shipping Board, and if the facts are so found the United States will pay the excess premium, based upon value not in excess of that on which the vessel has heretofore usually been insured. The value thus insured shall not be deemed in any way indicative of the just compensation to be paid in case of loss or damage due to the operation of risks assumed by the United States.

The United States also shall pay additional premium (based upon value not in excess of that on which the vessel has heretofore usually been insured) required for voyages outside the following warranties:

a. Warranted not to enter or sail from any port or ports, place or places in British North America on the Atlantic coast, except Halifax, Louisburg, and Sydney, for purpose of coaling, arming, and compulsory examination by the British Government, and not north of 50° north latitude on the Pacific coast.

b. Warranted not to enter the Baltic beyond 13° east longitude, or sail from a loading port therein between October 1 and April 1.

c. Warranted not to sail for or from any port or place on the north coast of Europe between North Cape and Cape Kanin, and not to proceed east of Cape Kanin in the Arctic Ocean.

d. Warranted not to sail with Indian coal as cargo between March 1 and June 30.

e. Warranted not to sail for or from any port or place in the Bering Sea or Alaska or Siberia (except that vessels may enter or sail from Vladivostok between May 1 and November 1).

And if the vessel be seaworthy at the time of her delivery under the requisition and at the commencement of the voyage from the United States, but subsequently becomes unseaworthy so as to constitute a breach of marine insurance warranty of seaworthiness, and such unseaworthiness be not due to or permitted to continue by the neglect or misconduct of the owner or his agents, and loss or damage ensues which is proximately occasioned by such unseaworthiness, the United States will assume such marine loss, in case the same shall be uncollectible, the extent of which shall be ascertained as of the date of such loss or damage. The United States Shipping Board shall have the right to determine finally any question of fact arising under this paragraph.

Upon giving five days' written notice the United States may elect to assume all marine risks, including collision liabilities.

In the event and to the extent that the owner shall not be able to secure marine insurance from established insurance companies, at rates considered reasonable by the United States Shipping Board, the United States shall assume the marine risks, including collision liabilities, until such time as the owner shall be able to secure such insurance.

Whenever the United States assumes the marine risks, including collision liabilities, or any part thereof, a deduction which in the opinion of the United States Shipping Board represents a proper premium charge shall be made from the monthly rate of hire.

If the vessel shall be lost in a service where she may have been exposed to both war and marine risks, in the event of there being no evidence as to whether loss is due to marine or war risk, it shall be presumed to be due to war risk.

The owner shall insure against the usual protection and indemnity risks for the full protection of the owner and the United States, the expense thereof to be borne 50 per cent by the owner and 50 per cent by the United States.

INSURANCE OF CREWS.

Thirteenth. Except when the vessel becomes a public ship, as provided in clause "Third," the owner must provide and pay for all insurance on the master, officers, and crew, as required by law; provided, however, that the United States shall reimburse the owner for all war-risk insurance, required by law, on the master, officers, and crew.

COMPENSATION IN EVENT OF LOSS OR DAMAGE—OPTION TO SUBSTITUTE VESSEL.

Fourteenth. In case of loss or damage due to the operation of a risk assumed by the United States, just compensation for such loss or damage, with interest at 6 per cent per annum commencing 30 days after proof of such loss or damage, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation. The United States shall, however, have the option (to be exercised within 90 days after the date of loss or constructive loss as provided in clause "Fifteenth") of delivering to the owner within a year after the loss, in lieu of such payment, a vessel of substantially similar tonnage, type, class, and value and of substantially no greater age (any deficiency in value to be paid for in cash), paying interest in the meanwhile from the date of loss at the rate of 6 per cent per annum on the value of the lost vessel.

CONSTRUCTIVE TOTAL LOSS.

Fifteenth. If the steamship sustains serious damage or other injury arising from the operation of a risk assumed by the United States, to such extent that the United States shall, without regard to any rule of law, consider her a total loss, the United States shall have the option (to be exercised within 90 days thereafter) of declaring the steamship to be a total loss as of the date of the damage, and of taking over or selling her, and the owner's rights as to compensation shall be the same as provided in clause "Fourteenth," interest to commence 30 days after proof of the damage.

SPACE AND ACCOMMODATIONS.

Sixteenth. The whole reach of the vessel's holds, decks, and other places of loading and accommodations (not to be loaded beyond what she can reasonably stow and carry) shall be at the disposal of the United States, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel.

DUTIES OF MASTER.

Seventeenth. The master shall prosecute his voyages with the utmost dispatch, shall render all customary assistance with ship's crew and boats, and use all diligence in caring for ventilation of the cargo. The master shall be under the orders and directions of the United States or its nominees as regards employment or agency. The United States shall load, stow, and trim the cargo at its own expense and risk under the supervision of the master, who is to have bills of lading for cargoes signed as presented, without prejudice to any term or provision of this contract, and the United States hereby agrees to indemnify the owner from all consequences or liabilities that may arise from the master's signing bills of lading or otherwise complying with the orders and directions of the United States.

RESPONSIBILITY FOR NAVIGATION.

Eighteenth. The master shall obey all orders and instructions which he may receive from the United States or from any of its nominees, and shall in all respects comply with any confidential instructions for masters which may be issued by the United States, but he shall be the agent of the owner in all matters respecting the management, handling, and navigation of the vessel, except when the vessel becomes a public ship or is otherwise subject to the immediate orders of the United States in respect to such matters.

SAILING DIRECTIONS.

Nineteenth. The United States shall furnish the master from time to time with all requisite instructions and sailing directions, and he shall keep a full and complete log of each voyage, which is to be patent to the United States at any time.

COMPLAINTS.

Twentieth. If the United States shall have reason to be dissatisfied with the conduct of the master, officers, or any member of the crew, the owner shall, on receiving particulars of complaint, investigate the same, and if necessary make a change in the appointments. In case of an emergency not permitting of such complaint and investigation, the United States shall have power to remove the master, officers, or any member of the crew and to appoint others in their places, but if possible the owner shall be consulted in the making of such appointments.

SUPERCARGO.

Twenty-first. The United States may appoint a representative to accompany the steamship, who shall be furnished, free of charge, with first-class accommodations, if space permits, and the same fare as provided at the captain's table.

LAPSE OF HIRE.

Twenty-second. In the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, collision, dry-docking for the purpose of examining or painting underwater parts or making any repairs, or from any other cause preventing the working of the vessel for more than 24 consecutive hours, the hire shall be reduced one-half until the vessel be again in an efficient state to resume her service, provided, however, that in case of loss of time in a port in the war zone, or at sea, due to any such cause, no such reduction shall be made if the owner shall show that he used due diligence to avoid such loss of time. Provided further, that there shall be no reduction of hire on account of loss of time arising from a war risk. Should the vessel be driven into port or anchorage by stress of weather, or from any accident to cargo, detention or loss of time occasioned thereby shall not be the cause for any cessation or reduction of hire. In any case of loss of time for which no reduction of hire is made, credit shall be given to the United States for any expenses saved by the owner during such time.

DRY-DOCKING.

Twenty-third. The steamship shall be dry-docked and her bottom cleaned and painted in the United States whenever the United States and the master think necessary, but at least once in each eight months, provided the exigency permits.

LIMITATION OF LIABILITY.

Twenty-fourth. Throughout the period of service under this "Time Form" losses or damages arising or occasioned by the following causes shall be always excepted, viz, the act of God, perils of the seas, fire on board, in hull, craft, or on shore, barratry of the master or crew, enemies, pirates, robbers or thieves, arrest and restraints of princes, rulers, and peoples, collisions and strandings, explosions, bursting of boilers, breakage of shafts, or any latent defect (even if existing at the beginning of the voyage) but not discoverable by due diligence, in the hull, boilers, machinery, or appurtenances, negligence, default, or error in judgment of the pilot, master, or crew, or other servants of the owner, in the management or navigation of the steamship.

This "time form" is subject to all the terms and provisions of and any or all the exemptions from liability contained in the act of Congress approved February 13, 1893.

GEAR—LIGHTS.

Twenty-fifth. The owner shall provide gear for all ship's derricks and shall maintain the gear of the vessel as fitted. The owner shall provide oil and lanterns for night work or vessel shall give use of electric lights when fitted therewith. The owner shall provide ropes, falls, slings, and blocks necessary to handle ordinary cargo up to 3 tons in weight, but at the expense of the United States.

DAY AND NIGHT WORK—OVERTIME.

Twenty-sixth. The vessel shall work day and night, as required, and the steam winches shall be at the service of the United States by day and night, with full steam; whenever possible without additional expense to the owner, same to be worked free of cost by the crew. The United States shall reimburse the owner for all overtime, provided the same be certified by the agent or nominee of the United States, or, if no agent is present, by the master, at such standard rates as may be in force from time to time.

ALTERATIONS AND VESSEL'S CONDITION ON REDELIVERY.

Twenty-seventh. The United States may at any time remove or alter, at its expense, all or any of the fittings of the vessel, and may erect any new fittings which may be required to render the vessel available for service to the United States, provided that she shall, at the cost of the United States, be redelivered to the owner in the same or as good order and condition as that in which she was when delivered to the United States, ordinary wear and tear and damage due to the operation of risks assumed by the owner excepted, or just compensation for the damage thus occasioned to the vessel, with interest at 6 per cent per annum commencing 30 days after the proof of such damage upon redelivery of the vessel, shall be paid by the United States, in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation.

SALVAGE.

Twenty-eighth. All derelicts and salvage shall be for the equal benefit of the United States and the owner, after deducting all expenses incident thereto and the proportion due to the master, officers, and crew.

GENERAL AVERAGE.

Twenty-ninth. General average, if incurred, shall be settled at New York according to York-Antwerp Rules of 1890 and Antwerp Rule of 1903, and as to matters not covered thereby according to the customs and practice of the port of New York.

LIENS.

Thirtieth. The United States shall have a lien on the vessel for all moneys paid and not earned or due to the owner and for all advances and overpayments made, and the United States shall have a lien on all cargoes and goods for the payment of freights and charges, including dead freight, demurrage, forwarding charges, charges for carriage to port of shipment, and for general average claims.

Thirty-first. No Member of or Delegate to Congress, or Resident Commissioner, nor any person employed by the United States Shipping Board is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, but under provisions of section 116 of the act of Congress approved 4 March, 1909, this stipulation, so far as it relates to Members of or Delegates to Congress, or Resident Commissioners, shall not extend or be construed to extend to any contract made with an incorporated company for its general benefit.

ARBITRATION.

Thirty-second. Any dispute of law or fact arising under this "Time Form," except as to the rate of hire and the compensation for actual or constructive total loss of the vessel, and except as to matters expressly left to be decided by the United States Shipping Board, shall be referred to the arbitration of three persons, one appointed by the owner, one by the United States, and the third by the two so chosen. They may proceed in any manner determined by themselves, and their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award hereunder the agreement may be made a rule of court. Such arbitration shall be a condition precedent to the commencement of any action.

SPECIAL CLAUSES—PASSENGER SHIPS.

Thirty-third. The owner of a passenger vessel shall permit the use, without extra cost therefor, of all cooking utensils and facilities already aboard the vessel, provided the same or their substantial equivalent be redelivered to the owner in the same or as good order and condition as when received, ordinary wear and tear and damage due to the operation of risks assumed by the owner excepted. An inventory of such property shall be furnished forthwith by the owner to the United States for verification.

Thirty-fourth. The owner of a passenger vessel, if requested by the United States, whenever passengers are on board the vessel, shall operate and maintain the saloon mess, for which the owner shall be compensated at reasonable rates to be fixed by the United States.

Thirty-fifth. The owner of a passenger vessel, if requested by the United States, shall operate and maintain a troop mess, in which the meals served shall be the equivalent of the authorized United States Army garrison ration, and for which the owner shall be compensated at reasonable rates to be fixed by the United States.

Thirty-sixth. Whenever passengers are carried (troops or others) the United States shall receive all the earnings therefrom, and pay all expenses incidental thereto which are not assumed by the owner under the other provisions of this "Time Form," including repairs and upkeep of fittings (subject to ordinary wear and tear but not breakage), and shall also furnish any additions it may require; or, in the alternative shall make a special arrangement with the owner on a per head basis.

SPECIAL CLAUSES—TANKERS—TANKS TO BE OIL-TIGHT.

Thirty-seventh. The owner guarantees that the tanks are oil-tight at the time of delivery and shall take every precaution to maintain them in this condition during the service, but shall not be responsible for leakage.

Thirty-eighth. The owner shall facilitate the discharge of oil fuel to such ships as the United States shall direct, and shall provide a Y piece with necessary reducers for each discharge up to the maximum number which can be used simultaneously.

Bare Boat Form.

PERIOD OF SERVICE—VESSEL TO BE COMPLETELY EQUIPPED AND FIT—MAKING GOOD DEFECTS.

First. The steamship shall remain in the service of the United States under the requisition order to be employed as and where the United States may from time to time determine and for such period of time as the United States may determine, but such period shall not extend beyond the first arrival of the steamship in an American port six months after peace is declared, unless she shall be required for Government purposes. The vessel, when placed at the disposal of the United States, as directed by it, shall be or shall forthwith be made at the expense of the owner tight, staunch, strong, and well and sufficiently tackled, appareled, furnished, outfitted, and equipped, and in every respect seaworthy and in good running order and condition, and shall be fit for the service in which she has usually been employed, having on her delivery United States inspection certificate that the steamship has met all requirements to fit her for the trade in which she is employed at the time of the requisition, except that no such certificate shall be required if she be a foreign-built vessel not at present subject to the United States steamboat inspection laws as provided in the Panama Canal act, as amended August 18, 1914. Any deficiency in these respects must be remedied forthwith at the expense of the owner; and any time lost in remedying such deficiency is not to be paid for by the United States.

OPERATION—PORT CHARGES.

Second. The United States, at its sole expense, shall man, operate, victual, and supply the vessel.

Third. The United States shall pay all port charges, pilotages, and all other costs and expenses incident to the use and operation of the vessel.

WAR AND MARINE RISKS.

Fourth. The United States shall assume war, marine, and all other risks of whatsoever nature or kind, including all risk of liability for damage occasioned to other vessels, persons, or property.

PAYMENT OF HIRE.

Fifth. The United States shall pay for the use of the steamship at the monthly rate which shall from time to time be established by the United States Shipping Board for a vessel of her description, commencing on and from the hour when she shall be ready for delivery under the requisition (and is so reported to the United States) and at and after the same rate for any part of a month, hire to continue until the hour at which the vessel may be ready for redelivery at a United States port (and is so reported to the owner).

If the United States Shipping Board shall hereafter lower the rate of hire from that in effect on 15 October, 1917, the owner shall have the option of canceling this requisition charter as of the date of such reduction, without prejudice to the rights of either party.

Payment of the hire shall be made in the District of Columbia, in cash, monthly, as earned, at the end of each calendar month. If the vessel is lost, hire shall be paid up to and including the date of her loss (if the time of her loss be uncertain, then up to and including the date she is last heard from).

DEAD-WEIGHT TONNAGE.

Dead-weight tonnage shall be based on summer freeboard assigned or to be assigned with reference to North Atlantic service, according to the standards of any recognized classification society; proper evidence of such assignment, together with a true copy of the dead-weight scale of the vessel, shall, if possible, be furnished by the owner. Until reasonable opportunity has been afforded the owner to procure such assignment, hire shall be paid on dead-weight tonnage as certified by the owner, any excess or deficiency in such hire to be adjusted upon subsequent determination of summer freeboard.

CLASSIFICATION.

Sixth. A certified statement from a recognized classification society that the vessel has been classed as fit for her usual previous service shall, if obtainable at a reasonable cost, be furnished by the owner. Any alterations which are made to obtain a class for North Atlantic service which are not required to obtain a class for the vessel's previous usual service shall be made by and at the expense of the United States, but there shall be no deduction from the hire for time consumed in making such alterations. So far as the exigencies of the service will permit, the United States shall do all things necessary to maintain the vessel's class.

FUEL AND STORES.

Seventh. The United States shall accept and pay for all fuel and consumable stores in good order and condition on board at the time of vessel's delivery under the requisition order, and the owner shall, on redelivery, pay for all such supplies left on board, at the current market price at the respective ports of delivery and redelivery. An inventory of all such supplies shall be furnished forthwith by the owner to the United States for verification.

OUTFIT AND EQUIPMENT.

Eighth. The United States shall have the use of all outfit, equipment, and appliances without extra cost, provided same or their substantial equivalent shall be returned to the owner when the vessel is redelivered in the same or as good order and condition as when received, ordinary wear and tear excepted. An inventory of such property shall be furnished forthwith by the owner to the United States for verification.

COMPENSATION IN EVENT OF LOSS OR DAMAGE.

Ninth. In case of actual or constructive loss as provided in clause "tenth," due to the operation of a risk assumed by the United States, just compensation for such loss, with interest at 6 per cent per annum, commencing 30 days after the date of such loss, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishling the amount of the just compensation. The United States shall, however, have the option (to be exercised within 90 days after the date of such actual or constructive loss) of delivering to the owner within a year after such loss, in lieu of such payment, a vessel of substantially similar tonnage, type, class, and value, and of substantially no greater age (any deficiency in value to be paid for in cash), paying interest in the meanwhile from the date of loss at the rate of 6 per cent per annum on the value of the lost vessel.

In case of damage (not constituting an actual or constructive loss) due to the operation of a risk assumed by the United States, the vessel shall, at the cost to the United States, be restored to the owner at the expiration of her service under the requisition, in the same or as good order and condition as that in which she was when delivered to the United States ordinary wear and tear excepted, or, just compensation for the damage, with interest at 6 per cent per annum, commencing 30 days after proof of such damage upon redelivery of the vessel, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation.

CONSTRUCTIVE TOTAL LOSS.

Tenth. If the steamship sustains serious damage or other injury to the extent that the United States shall, without regard to any rule of law, consider her a total loss, the United States shall have the option (to be exercised within 90 days thereafter) of declaring the steamship to be a total loss as of the date of the damage, and of taking over or selling her, and the owner's rights as to compensation shall be the same as provided in clause "Ninth," interest to commence 30 days after the date of the damage.

ALTERATIONS AND VESSEL'S CONDITION ON REDELIVERY.

Eleventh. The United States may at any time remove or alter, at its expense, all or any of the fittings of the vessel, and may erect any new fittings which may be required to render the vessel available for service to the United States, provided that the vessel shall, at the cost of the United States, be restored to the owner at the expiration of her service under the requisition in the same or as good order and condition as that in which she was when delivered to the United States, ordinary wear and tear excepted, or just compensation for the damage thus occasioned to the vessel, with interest at 6 per cent per annum, commencing 30 days after the proof of such damage upon redelivery of the vessel, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation.

LIENS.

Twelfth. The United States shall have a lien on the vessel for all moneys paid and not earned or due to the owner and for all advances and overpayments made, and the United States shall have a lien on all cargoes and goods for the payment of freights and charges, including dead freight, demurrage, forwarding charges, charges for carriage to port of shipment, and for general average claims.

ARBITRATION.

Thirteenth. Any dispute of law or fact arising under this "Bare Boat Form," except as to the rate of hire and the compensation for actual or constructive total loss of the vessel and except as to matters expressely left to be decided by the United States Shipping Board, shall be referred to the arbitration of three persons, one appointed by the owner, one by the United States, and the third by the two so chosen. They may proceed in any manner determined by themselves, and their decision, or that of any two of them shall be final, and for the purpose of enforcing any award hereunder the agreement may be made a rule of court. Such arbitration shall be a condition precedent to the commencement of any action.

Fourteenth. No Member of or Delegate to Congress or Resident Commissioner, nor any person employed by the United States Shipping Board, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, but under the provisions of section 116 of the act of Congress approved March 4, 1909, this stipulation so far as it relates to Members of or Delgates to Congress or Resident Commissioners, shall not extend or be construed to extend to any contract made with an incorporated company for its general benefit.

SPECIAL CLAUSE—PASSENGER SHIP.

Fifteenth. The owner of a passenger vessel shall permit the use, without extra cost therefor, of all cooking utensils and facilities already aboard the vessel, provided the same or their substantial equivalent be returned to the owner when the vessel is redelivered in as good order and condition as when received, ordinary wear and tear excepted. An inventory of such property shall be furnished forthwith by the owner to the United States for verification.

SPECIAL CLAUSES—TANKERS—TANKS TO BE OIL TIGHT.

Sixteenth. The owner guarantees that the tanks are oil tight at the time of delivery.

Seventeenth. To facilitate the discharge of oil fuel, the owner shall provide a Y piece with necessary reducers for each discharge up to the maximum number which can be used simultaneously.

ORDER OF COURT OVERRULING EXCEPTIONS.

Filed February 28, 1921.

In the United States District Court for Maryland, in Admiralty. F. E. Richards, etc., *v.* S. S. *Carolinian.*

The above-entitled cause being heard upon exceptions of the Government of the United States of America as intervenor, it is, this 28th day of February, 1921, ordered by the court that such exceptions be and they are hereby overruled with leave to answer the libel within 15 days.

JOHN C. ROSE,
United States District Judge.

OPINION OF COURT.

Filed March 1, 1921.

In the United States District Court District for Maryland, in Admiralty. F. E. Richards, as liquidator of the Steamship Tregenna Co. (Ltd.), owner of S. S. *Mavisbrook*, *v.* S. S. *Carolinian.*

ROSE, *District Judge:* This is a collision case. The Government has excepted to the libel on the ground that at the time the collision took place the *Carolinian* was under requisition by the Government of the United States, upon the bare-boat charter basis, and was actually being then used as an Army transport, being manned by an Army crew furnished by the War Department.

Subsequent to the collision, and before the arrest, the requisition and charter were terminated, and she was returned to her owner, in whose possession she was when arrested.

The Government says that the only way in which a ship can become responsible in rem for a tort, is through the fault of some one, whose relation to her is such that she is answerable for his shortcomings, and that neither the Government nor its property can ordinarily be held liable for wrong done by its servants or agents.

It further contended that at the time of the collision the *Carolinian* was not employed as a merchant vessel, and therefore the libellant can not rely upon section 9 of the act of 1916.

At the time she was seized by the marshal she was solely employed as a merchant vessel, and at that time she was not immune from ordinary process upon a libel in rem against her. (The *Lake Monroe*, 250 U. S. 246.)

Nevertheless, it is now urged that no liability in rem ever attached to a ship for anything she does while in public service and in possession of the Government. What Chief Justice Waite *said* while on circuit in *The Fidelity*, 8 Fed. Cases, No. 4758, fully sustains this contention. But the Supreme Court, in *Workman* v. *New York City*, 179 U. S. 552, explained that what was *decided* in that case was merely the application of the exception to the mode of execution of a judgment or decree against a municipal corporation, and then went on to say that in the admiralty law the existence of that exception in all cases had been denied citing a case from this district (*Oyster Police Steamers of Md.*, 31 Fed., 763). It expressly declined to pass upon which of the conflicting conclusions on this point was the correct one. The *Siren* was cited, 7 Wall. 163, and the English cases analyzed, and it was then declared that the English law, in harmony with the maritime law of this country, held that the fact that the wrong had been committed by a public vessel of the Crown afforded no ground for contending that no liability arose because of the public nature of the ship, although it may be, in consequence of a want of jurisdiction over the sovereign, redress can not be given. It said that the public nature of the service upon which the vessel was engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, when the court has jurisdiction. In *The Siren*, supra, the libel was in rem.

The language of the Supreme Court is so clear that it does not seem that it is open to two constructions, and such clearly was the opinion of the judges who sat in *The Florence H.*, 248 Fed., 1012; *The Gloria*, 267 Fed., 929; *Samuelson* v. *The F. J. Luchenbach*, 267 Fed., 931; and *The City of Philadelphia*, 263 Fed., 234.

It may be said in this case that the *Carolinian* itself has been released in accordance with the provisions of section 4 of the act of March 9, 1920, and the only question remaining open is whether any liability was incurred for the tort committed while she was in the Government service; and if so, for how much?

It follows from what has been said that the Government's exceptions will be overruled.

UNITED STATES OF AMERICA,
District of Maryland, to wit:

I, Arthur L. Spamer, clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true copy of the record of proceedings in the therein entitled case of *F. E. Richards* v. *Steamer Carolinian*, No. 656 admiralty docket in said District Court.

In testimony whereof, I hereby set my hand and affix the seal of the said District Court this 10th day of March, 1921.

[SEAL.] ARTHUR L. SPAMER, *Clerk*.

MEMORANDUM IN SUPPORT OF APPLICATION.

I.

All the jurisdictional questions here suggested have been fully reviewed in a memorandum, to which we ask leave to refer, filed this day in support of a similar application to this court, made by the Government in case No. —— original, entitled "In the matter of the petition of the United States of America, owner of the steamship *Western Maid*." The status of the vessels are different. In the present application the *Carolinian*, privately owned, had been requisitioned by the Government upon the bare-boat basis. At the time of the collision she was a vessel belonging to the Government and employed as an Army transport. At the time of the filing of the libel and her attachment thereunder, she had been reconditioned and redelivered by the Government to her private owners, who had then assigned her to merchant trade. The *Western Maid*, the vessel proceeded against in case No. —— original, has always been owned by the Government. At the time of the collision she was an Army transport devoted to military operations, but at the time of the filing of the libel and her arrest thereunder, was employed by the Government in merchant service. The present application relates to a group of cases, and there are many of them, in which the vessel, privately owned, has been proceeded against by libel in rem, while operating in owner's own service, but to enforce lien liability alleged to have attached to the vessels while under requisition to the Government and then employed by the Government as troop and cargo transport, mine layers and sweepers, and patrol and guard boats to serve military needs.

II.

It is respectfully submitted that the motion for a writ of prohibition and/or a writ of mandamus should be granted and that a rule should be entered directing the Hon. John C. Rose, judge of the District Court of the United States for the District of Maryland, and the other judges and officers thereof to show cause why the writ of prohibition and/or the writ of mandamus should not issue as prayed for in said petition.

HARRY M. DAUGHERTY,
Attorney General of the United States.
WILLIAM L. FRIERSON,
Solicitor General.
J. FRANK STALEY,
HORACE T. ATKINS,
Special Assistants to the Attorney General.

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Office Supreme Court,
FILED
SEP 23 1921
JAMES D. MAHE
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No. 23, Original.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

In the Matter

of

he Petition of THE UNITED STATES OF AMERICA, former requisitioned and chartered owner of the American steamship *Carolinian*, for a Writ of Prohibition and/or a Writ of Mandamus against the Honorable JOHN C. ROSE, Judge of the District Court of the United States for the District of Maryland, and the Officers of said Court.

ETURN TO PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

The Hecla Press, 57 Warren St., N. Y. Tel. Barclay 6280.

Return of Order to Show Cause Against Issue of Writ of Prohibition and/or Mandamus.

Supreme Court of the United States

OCTOBER TERM, 1920.

IN THE MATTER OF The petition of the United States of America, former requisitioned and chartered owner of the American S/S *Carolinian* for a writ of prohibition and/or a writ of mandamus against the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, and the officers of said court.	33 Original.

RETURN OF JOHN C. ROSE, DISTRICT JUDGE OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND OF THE OFFICERS OF SAID COURT.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

In compliance with the order to show cause why the prayer of petition should not be granted, issued by this Honorable Court on April 11, 1921, and served May 12, 1921, the above-named respondents do hereby respectfully present that:

FIRST: On July 9, 1920, F. E. Richards, as liquidator of Steamship Tregenna Co. (Ltd.), owner of the steamer *Mavisbrook*, filed a libel against the steamer *Carolinian*, her engines, boilers, etc., and against all persons lawfully intervening for their interests therein in the United States District Court for the District of Maryland. This libel alleged, among other things, that on the 15th day of February, 1918, while the steamer *Mavisbrook* was lying properly anchored in the harbor of Brest, France, laden with a cargo of lumber, and about to sail from that port, the steamer *Carolinian* ran into and collided with the *Mavisbrook*, the *Carolinian's* stem striking the *Mavisbrook* on the port side of the *Mavisbrook* abreast her main rigging. Said libel further alleged that the said collision was not due to any fault or neglect on the part of the steamer *Mavisbrook*, or those in charge of her, but was due solely to the fault and negligence of the steamer *Carolinian*, and those in charge of her, in various particulars; that by reason of the premises the steamer *Mavisbrook* and her owners had sustained damage, as nearly as could be estimated, in about $20,000, no part of which had been paid though duly demanded. Said libel further alleged that the *Carolinian* was then, or soon would be, within the jurisdiction of the United States District Court for the District of Maryland, and prayed that process in due form of law in accordance with the practice of this

Court in cases of admiralty and maritime jurisdiction might issue against the steamer *Carolinian*, her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer the matters aforesaid, and that the libelant might have a decree for the damages sustained by it as aforesaid, together with interest and costs, and that the steamer *Carolinian*, her engines, boilers, etc., might be condemned and sold to pay the same, and that the libelant might have such other and further relief as might be just.

A copy of the said libel which is annexed to the petition and is printed on pages 10 to 13 thereof is made a part of this return.

SECOND: On July 21, 1920, the Hon. Robert R. Carman, United States Attorney for the District of Maryland, filed a suggestion in the suit above mentioned, stating that the steamship *Carolinian* was a privately owned vessel not in the possession of the United States or of any corporation in which the United States or its representatives own the entire outstanding capital stock; that the said steamship *Carolinian* had been arrested or attached upon a cause of action alleged to have arisen from previous possession, ownership or operation of the said steamship by the United States or by such corporation, and that

> "The United States further suggests that it is interested in the above-entitled cause; that it desires the immediate release of said steamship *Carolinian* from said arrest or attachment without bond or stipulation therefor; and that the United States assumes the liability for the satisfaction of

any decree obtained by the above-named libelants in the above-entitled cause.

By direction of the Attorney General of the United States."

A copy of the suggestion, which is annexed to the petition and printed on pages 13 and 14 thereof, is made a part of this return.

THIRD: Upon the same day (July 21, 1920) and upon the foregoing suggestion, it was ordered by the Court that the steamship *Carolinian* should be released. A copy of this order, which is annexed to the petition and printed at page 14 thereof, is made a part of this return.

FOURTH: On January 6, 1921, the Hon. Robert R. Carman, United States Attorney for the District of Maryland, as proctor for the Government of the United States of America, filed a further suggestion on behalf of the United States in which, claiming to appear specially, he stated that at the time of the said collision, February 15, 1918, the steamer *Carolinian* had been requisitioned by the Government of the United States upon a bare boat basis, by virtue of the authority of the Act of Congress of June 15, 1917, and the executive order of July 11, 1917, and that thereby the said s/s *Carolinian* at the time of the happening of the said collision was a vessel belonging to the United States. A copy of the charter of the s/s *Carolinian* to the United States is attached to and made a part of the suggestion.

Said suggestion further stated that at the time of the collision the *Carolinian* had been assigned to the War Department of the United States and was employed by it as an army transport, then being manned by and through an army crew furnished by the War Department of the United States. That after said collision the War Department released said steamship from requisition and cancelled her requisition charter and redelivered her to her owners, and that at the time of the filing of the libel herein said steamship was employed by her owners in their own service.

It was further suggested that as said steamship *Carolinian* at the time of said collision was a vessel belonging to the United States and employed in public service for war needs, no liability by reason of the said collision was created which survives or becomes enforcible against the vessel upon her redelivery from public service to her owners as aforesaid, and that there is now no collision claim enforcible *in rem* against the said s/s *Carolinian.*

The said suggestion concluded with a prayer that this Court declare that there is no right in the libelant herein to maintain said libel *in rem* against said steamship to recover its collision damages, and that the said libel be dismissed wth costs.

A copy of the said suggestion which is annexed to the petition and printed at pages 14 to 36 thereof is made a part of this return.

Fifth: Thereafter the cause having come on to be heard on exceptions of the Government of the United States of America, as intervenor, it was on February 28, 1921, ordered by the Court that the exceptions be overruled with leave to answer the libel within fifteen days. A copy of said order, which is annexed to the petition and printed at page 37 thereof, is made a part of this return.

SIXTH: On March 1, 1921, the Hon. John C. Rose, Judge of the United States District Court for the District of Maryland, filed an opinion stating the reasons for which the said exceptions were overruled. A copy of this opinion, which is annexed to the petition and printed at pages 37 to 39 thereof, is made a part of this return.

The respondents respectfully submit that the United States District Court for the District of Maryland had jurisdiction of the subject-matter of this suit and the *res* therein attached.

Having fully answered the petition it would appear that said rule should be dismissed and said writ denied and that the respondents be hence dismissed.

Messrs. Haight, Sandford, Smith & Griffin and Brown, Marshall, Brune and Parker, proctors for the libelants in the original suit, having desired to be heard, in order to secure them such opportunity, the respondents hereby designate them or such associate counsel as they may select to present this return and to file such brief and make such argument as may be required on the order to show cause.

IN WITNESS WHEREOF, I, JOHN C. ROSE, Judge of the District Court of the United States for the District of Maryland, have hereunto set my hand and the seal of this Court this 14th day of September, 1921.

JOHN C. ROSE,
U. S. District Judge.

(SEAL OF DISTRICT COURT)

DEC 12 1921
WM. R. STANSBUR
CLERK

IN THE

Supreme Court of the United States.

October Term, 1921. No. 23. Original.

IN THE MATTER

of

THE PETITION OF THE UNITED STATES OF AMERICA, FORMER REQUISITIONED AND CHARTERED OWNER OF THE AMERICAN STEAMSHIP "CAROLINIAN", FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS AGAINST THE HON. JOHN C. ROSE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE OFFICERS OF SAID COURT.

BRIEF ON BEHALF OF THE HONORABLE JOHN C. ROSE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE OFFICERS OF SAID COURT.

HAIGHT, SMITH, GRIFFIN & DEMING,
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IN THE

Supreme Court of the United States.

In the Matter *of* The Petition of the United States of America, Former Requisitioned and Chartered Owner of The American Steamship "Carolinian" for a Writ of Prohibition and/or a Writ of Mandamus Against the Hon. John C. Rose, Judge of the District Court of the United States for the District of Maryland and the Officers of Said Court.	October Term 1921 No. 23 Original.

Brief on behalf of the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, and the Officers of said Court.

STATEMENT.

This is an original proceeding based on the petition of the United States for a writ of prohibition and/or a writ of mandamus.

Facts.

On July 9, 1920, F. E. Richards, liquidator of the Steamship Tregenna Company, Ltd., owner of the steamer *Mavisbrook*, filed a libel *in rem* in the U. S. District Court for the District of Maryland against the steamship *Carolinian* to recover damages sustained by the *Mavisbrook* in a collision with that vessel.

After appropriate allegations as to the incorporation of the libelant and its ownership of the *Mavisbrook*, the libel alleged that on February 15, 1918, while the *Mavisbrook* was lying at anchor, the steamship *Carolinian* ran into her head on, striking the *Mavisbrook* on the port side abreast her main rigging; that the collision was not due to any fault or neglect on the part of the steamer *Mavisbrook* or those in charge of her, but was due solely to the fault and negligence of the steamer *Carolinian* and her navigators in several particulars duly stated. Damages were alleged in the amount of about $20,000 as nearly as could then be estimated, and the libel contained the usual jurisdictional averment that the *Carolinian* was then or soon would be within the jurisdiction of the Court.

The prayer of the libel was that process in due form of law should issue against the steamer *Carolinian*, her engines, boilers, etc., that all persons having or claiming any interest therein should be cited to appear and answer the matters aforesaid, that the libelant should have a decree for the damages sustained, together with interest and costs, and that the steamer *Carolinian* might be condemned and sold to pay the same. It was, in short, an ordinary libel *in rem,* filed by a private party to recover collision damages against a privately owned vessel. No relief was asked against the United States or any property belonging to or in the possession of the United States.

On July 21, 1920, the Hon. Robert R. Carman, United States Attorney, filed a suggestion, stating that the steamship *Carolinian* was a privately owned vessel not in possession of the United States or of any corporation in which the United States or its representatives owned the entire outstanding capital stock, and that the said steamship had been arrested or attached upon a cause of action alleged to have arisen from previous possession, ownership or operation of said steamship by the United States or such corporation. It was further suggested that the United States was interested in the cause, that it desired the immediate release of the said steamship from the said arrest or attachment without bond or stipulation, and that the United States agreed to assume liability for the satisfaction of any decree obtained by the libelants in the cause.

This suggestion was filed pursuant to Sec. 4 of the Act of Congress approved March 9, 1920,* (41 Stat. 525) providing that if a privately owned vessel not in the possession of the United States is arrested or attached in an action based on the previous possession, ownership, or operation of the United States, it shall be released upon a suggestion that the United States is interested in the suit and assumes liability for the satisfaction of any decree rendered in favor of the libellant.

An order was thereupon made releasing the *Carolinian* from arrest.

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* The text of this statute will be found in the Appendix.

On January 6, 1921, the Hon. Robert R. Carman, United States Attorney, as proctor for the Government of the United States of America, filed a further suggestion, stating that at the time of the said collision, the steamship *Carolinian* had been requisitioned by the Government of the United States, upon the bare boat charter basis, under the Act of Congress of June 15, 1917, and the Executive Order of July 11, 1917.

A copy of the charter was attached to the suggestion, and is printed in full in the petition on pp. 16 to 36. It is headed, "Requisition Charter" and is executed by the Garland Steamship Corporation, as owner and by the U. S. Shipping Board. After stating certain particulars as to the vessel, immaterial for present purposes, the charter continues:

> "This requisition charter made and concluded upon in the District of Columbia the 28th day of December, 19.., between Garland Steamship Corporation, of ...., of New York, *owner* of the good American single-screw steamship *Carolinian*, of New York, of 4,170 tons gross register and 2,707 tons net register, built in West Hartlepool, England, having engines of 325 nominal horsepower, provided with proper certificate for hull and machinery, and classed 100 A-1 at British Lloyds, of about 348,319 cubic feet capacity and 6,975 sub. to correction tons deadweight capacity, summer free-board, inclusive of permanent bunkers, capable of making an average voyage speed when loaded of 9 knots an hour, under ordinary conditions, on a consumption of about 27 tons of coal, or about .... barrels of oil, per 24 hours; and the United States of America, through the United States Shipping Board—
>
> Witnesseth:
>
> Whereas by requisition order, dated August

> 22, 1917, pursuant to the urgent deficiency act of June 15, 1917, and the President's Executive order of July 11, 1917, the United States has requisitioned the *use* of the steamship *Carolinian*, and the steamship has been delivered into possession of the United States pursuant to the requisition; and
>
> Whereas it is desired by the United States and by the owner to fix the compensation (hereinafter called hire) which the United States shall pay to the owner for use of the steamship so requisitioned, and to define by agreement the rights and duties of the United States and of the owner with respect to the operation of the vessel under the requisition, and with respect to other matters in connection therewith:
>
> Now, therefore, it is agreed as follows:" (Italics ours.)

The terms of the agreement were that the *Carolinian* might be employed by the United States either under the "bare boat" or "time" form. The "bare boat" form, under which it is alleged the *Carolinian* was employed, is printed in the petition at pp. 31 to 36, and contains the customary provisions for the bare boat charter of a ship. The vessel when placed at the disposal of the United States was to be tight, staunch, strong and well and sufficiently equipped, etc., and any deficiency was to be remedied forthwith at the owner's expense, any time so lost not to be paid for by the United States. The United States was to man, operate, victual and supply the vessel and pay all port charges, pilotages and other costs and expenses incident to the use and operation of the vessel. The United States was to pay hire to the owners of the vessel at the monthly rate established by the U. S. Shipping Board for a vessel of her description, subject to the owners' right of cancellation if the Shipping Board should lower the rate of hire from that in effect on October 15, 1917. The United States was to have a lien on the vessel for all monies paid and not earned or due to the owner, and for all advances or overpayments made. The United States agreed to assume war and marine risk, "including all risk of liability for damage occasioned to other vessels, persons or property" (Petit., p. 32). The bare boat charter contained other provisions, not necessary to recite, relating to the determination of the vessel's deadweight tonnage, her classification, fuel and stores on delivery and redelivery, outfit and equipment, compensation in event of loss or damage, etc.

The suggestion further states that at the time of said collision the *Carolinian* had been assigned to the War Department of the United States and was employed by it as an army transport, being manned by an army crew furnished by the War Department; that after the collision the War Department released the *Carolinian* from requisition, cancelled her requisition charter and redelivered her to her owners, and that at the time of the filing of the libel herein, the *Carolinian* was employed by her owners in their own service.

The suggestion further alleges that as the *Carolinian* at the time of the collision was a vessel "belonging to" the United States and employed in public service for war needs, no liability by reason of said collision was created which survived or became enforcible *in rem* against the said vessel upon her redelivery from public service to her owners, and that there was then no collision claim enforcible *in rem* against the *Carolinian*.

The suggestion prays that the District Court should declare that there was no right of the libelant to maintain a libel *in rem* against the *Carolinian* to recover the collision damages and that the said libel should be dismissed with costs.

After a hearing on the suggestion Judge Rose, on February 28, 1921, made an order overruling the exceptions of the United States with leave to answer the libel within 15 days. On March 1, 1921, Judge Rose filed his opinion, on which the order made the day previous was based. The opinion and order are printed on pp. 37-39 of the petition.

I.

Inasmuch as the collision occurred by reason of the fault of those lawfully in charge of the Carolinian, a privately owned vessel, a maritime lien was created which became enforcible when government possession had been relinquished.

It is desired at the outset to call the Court's attention to the fact that the case of the *Carolinian* is materially different from that of the *Western Maid*, and other cases, where at the time of the collision title to the ship was in the Government. The *Carolinian* was never the property of the United States. She remained throughout in the ownership of the Garland Steamship Corporation, a private corporation organized under the laws of New York. She was merely *chartered* by the United States,—it is immaterial that this charter was imposed upon her owner *in invitum*. That a maritime lien for collision may be created against a vessel which, at the time of the collision, is in the possession of a charterer has been so definitely decided by this Court as to preclude further argument of the question.

In *The Barnstable,* 181 U. S. 464, one of the questions before this Court was as to whether a maritime lien for collision had been created against the steamship *Barnstable* which, at the time of the collision, was in the possession of a charterer under a bare boat form of charter. This Court said:

> "The law in this country is entirely well settled, that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of any one who is lawfully in possession of her, whether as owner or charterer. *The Little Charles,* 1 Brock. 347, 354. It was said by this court in the case of *The Palmyra,* 12 Wheat. 1, 14, referring to a seizure in a revenue case: 'The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this whether the offence be *malum prohibitum* or *malum in se.* The same principal applies to proceedings *in rem,* on seizure in the admiralty.' So in *United States* v. *Brig Malek Adhel,* 2 How. 210, speaking of a forfeiture incurred by a piratical aggression, Mr. Justice Story remarked (p. 233): 'That the act makes no exception whatsoever, whether the aggression be with or without the cooperation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. . . . It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard

> whatsoever to the personal misconduct or the personal responsibility of the owner thereof.' This was the principle upon which this court held, in the case of *The China*, 7 Wall. 53, that a vessel was liable for a collision occasioned by the fault of a compulsory pilot—a marked distinction from the English rule, which, by statute, exempts the vessel from such consequences." (181 U. S. 467, 468.)

In *The China, supra,* it was held that the ship was liable *in rem* for a collision due to the negligence of a compulsory pilot,—*it was immaterial that the owners were compelled to employ the pilot by the law.* Commenting upon this decision in *Ralli* v. *Troop*, 157 U. S. 386, this Court said:

> "That decision proceeded, not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo; nor upon the law of contribution in general average as between them; but upon a distinct principle of the maritime law, namely, *that the vessel, in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages.* 7 Wall. 68. As said by Mr. Evarts, in his argument for the libellants, 'This theory treats the faults of conduct in the vessel's navigation as imputable to the vessel itself, and discards as immaterial all considerations touching the *adjustment* among the navigators, or between them and the owners, of the personal fault or personal responsibility of the misgovernment of the vessel." (Italics ours, 157 U. S., pp. 402, 403.)

The decision in *The China* is settled law in the United States. *Hughes* on *Admiralty*, 2nd ed. (1920), p. 37.

The officers in command of the ~~*Mavisbrook*~~ Carolinian when this collision occurred, while imposed upon the ship by the authority of the government under the Act of Congress of June 15, 1917, occupied no different position from the compulsory pilot imposed upon the *China.*

In *The John G. Stevens,* 170 U. S. 113, where the nature of the maritime lien for collision was exhaustively discussed, it was said:

> "The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, *by whomsoever owned or navigated,* is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. * * *
>
> "The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, *jus in re,* a proprietary interest in the offending ship, and which, when enforced by admiralty process *in rem,* relates back to the time of the collision. *The offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for the wrong done.* The owner of the injured vessel is entitled to proceed *in rem* against the offender, *without regard to the question who may be her owners* or to the division, the nature or the extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern." (Italics ours, 170 U. S., pp. 120, 122, 123.)

In *Tucker* v. *Alexandroff,* 183 U. S. 424, this Court said:

> "A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries

> of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforcible in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. *The China*, 7 Wall. 53; *Thorp* v. *Hammond*, 12 Wall. 408; *Workman* v. *New York City*, 179 U. S. 552; *The Little Charles*, 1 Brock. 347, 354; *The John G. Stevens*, 170 U. S. 113, 120; *Homer Ramsdell Co.* v. *Comp. Gen. Trans.*, 182 U. S. 406. *She is capable, too, of committing a tort, and is responsible in damages therefor.*" (183 U. S., p. 438, italics ours.)

In *Workman* v. *New York City*, 179 U. S. 552, the principle of governmental immunity was discussed and the decisions analyzed. In that case an action was brought *in personam* by the owners of the British barkentine Linda Park against the City of New York to recover for damages sustained in consequence of a city fire boat having run down the libelant's vessel. The City of New York defended on the ground that its fire boat was performing a governmental service in responding to a call of fire and that accordingly it could not be held liable for the negligence of the fire boat's navigators. In answering the contention, this Court said:

> "The contention is, although the corporation had general capacity to stand in judg-

ment, and was therefore subject to the process of a court of admiralty, nevertheless the admiralty court would afford no redress against the city for the tort complained of, because under the local law the corporation as to some of its administrative acts was entitled to be considered as having a dual capacity, one private, the other public or governmental, and as to all maritime wrongs committed in the performance of the latter functions it should be treated by the maritime law as a sovereign. But the maritime law affords no justification for this contention, and no example is found in such law, where one who is subject to suit and amenable to process is allowed to escape liability for the commission of a maritime tort, upon the theory relied upon. We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity the sovereign of another country was not subject to be impleaded, no redress could be given. Both of these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted. As a consequence, *the doctrine above stated rests not upon the supposed want of power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted.* In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted." (179 U. S. 566, italics ours.)

This Court then proceeded to review the American and English decisions as follows:

"The decisions of this court clearly expound the principles we have stated. *The Exchange* (1812), 7 Cranch 116, involved the right of a court of admiralty to enforce, by a proceeding *in rem*, an alleged maritime claim against a vessel of war of a foreign nation. The right to relief was denied exclusively because of a want of jurisdiction over the foreign sovereign or his property.

The Siren (1869) 7 Wall. 153, involved the liability of a prize ship in the possession and control of the officers of the United States for an injury inflicted by a collision of the ship with another vessel, averred to have been occasioned by the negligent management of those in charge of the prize ship. In considering the power of the court to adjudicate the controversy, the court said (p. 185):

'For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. *In such case the claim exists equally as if the vessel belonged to a private citizen*, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.

'In England, when the damage is inflicted by a vessel belonging to the crown, it was formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel *in rem,* upon which the court directs the registrar to write to the Lords of the Admiralty requesting an appearance on behalf of the crown which is generally given—when the subsequent proceedings to decree are conducted as in other cases. Coote's New Admiralty Practice, 31. In the case of *The Athol,* 1 W. Robinson, 382, the court refused to issue a monition to the Lords of the Admiralty to appear in a suit for damage by collision, occasioned to a vessel by a ship of the crown; but the Lords having subsequently directed an appearance to be entered, the court proceeded with the case, and awarded damages. As no warrant issues in these cases for the arrest of the vessels of the crown, and no bail is given on the appearance, it is insisted that they are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the government is concerned. This may be the only results of the suits, but they are instituted and conducted on the hypothesis that claims against the offending vessels are created by the collision. *The Clara,* 1 Swabey, 3, and *The Swallow,* 1 Swabey, 30. The vessels are not arrested and taken into custody by the marshal, for the reasons of public policy already stated, and for the further reason that it is to be presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared.'

As the prize vessel had been condemned and sold at the instance of the United States, and the proceeds were in the registry of the court for distribution, the court gave the relief sought against the proceeds of the sale, because the facts stated established, not only the liability of the offending ship, but also furnished the basis of jurisdiction.

The same principle was applied in the later case of *The Davis* (1869), 10 Wall. 15, where it was held that personal property of the United States on board of a vessel for transportation from one point to another was liable to a lien for salvage service rendered in saving the property from a peril of the sea, and that such lien might be enforced by a proceeding *in rem*, when the process of the court might be used without disturbing the possession of the government.

The statement of the maritime law of England on the subject now being considered made in *The Siren*, *supra*, makes it clear that, *in harmony with the maritime law of this country, the fact that a wrong has been committed by a public vessel of the crown affords no ground for contending that no liability arises, because of the public nature of the vessel, although, it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given.* This is well illustrated by the cases to which we shall now refer.

The Athol, (1842), 1 Wm. Rob. 374, was the case of a British troopship which had run down a brig in the English Channel. The Lords of the Admiralty having refused a petition for compensation, the owner of the brig applied to the High Court of Admiralty to decree a monition to issue against those officials. In declining to issue the monition, for want of power, Dr. Lushington said (p. 382):

'Under the circumstances of this case then, both upon principle and the authority of decided cases, I must decline to issue the monition as prayed. At the same time, sitting here as a judge, in a court of justice, I am bound to express the opinion that I cannot apprehend the high personages who represent Her Majesty in her office of Admiralty, will avoid doing justice, or that, upon a due consideration, they will take upon themselves to say, that they will be themselves the exclusive judges upon the merits of the present case. Whether they shall appear or not, is not a matter for this court to determine. I decline to grant the monition.'

The Lords of the Admiralty subsequently directed that an appearance should be made on behalf of *The Athol,* and as by this act the court had jurisdiction to determine the controversy, it did so, held *The Athol* to have been in fault, and, despite the public nature of the vessel, 'the damages and costs were pronounced for.'

The Parlement Belge, (1879) 4 P. D. 129, was an action instituted on behalf of the owners of a steam tug against the steamship Parlement Belge and her freight to recover damages sustained by the tug in a collision with the steamship. The latter vessel was, at the time of the collision and when the action was instituted, a public vessel of the Government of the sovereign state of Belgium, navigated and employed by and in the possession of such government, and officered by officers of the royal Belgium navy, holding commissions from His Majesty, the King of Belgium, and in the pay and service of his government. Besides carrying the mails, between Dover and Ostend, the Parlement Belge carried passengers and merchandise, and was employed in earning passage-money and freight. Sir Robert Phillimore declared (p. 144) that the case was one of first impression, and to be decided upon general principles and the analogies of law rather than upon any direct precedent, and it was held that the Parlement Belge did not come within the category of a ship of war or a pleasure vessel belonging to the crown of Belgium, and was not exempt from the process of the court. On appeal, however, (5 P. D. 197), it was held that the admiralty court was concluded by the declaration of the sovereign authority that the vessel was a public vessel of the state, and,

> further, that the mere fact of the ship having been used subordinately for trading purposes did not take away the immunity attaching to the public vessel of an independent sovereignty, and that the vessel could not be proceeded against." (179 U. S., pp. 566 to 570, italics ours.)

After this full review of the decisions this Court announced its conclusion:

> "*It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction.*"
> (Italics ours: 179 U. S. 570.)

The above decisions show that in order to sustain a suit *in rem* for collision only two conditions need exist: (1) fault on the part of the navigators of the vessel to be proceeded against and (2) the ability of the Court to execute its process by seizure. Admittedly both of these conditions were fulfilled in the case at bar.

Fault on the part of the navigators of the *Carolinian* is alleged in the libel and is, of course, admitted for the purposes of the present proceeding. Nor could any obstacle have been interposed to the execution of the Court's process. Long prior to the filing of the libel, the *Carolinian* had been returned to the possession of the owners and was subject to attachment and seizure to the same extent as any other vessel in private ownership. A lien which was inchoate at the time of the collision, ripened into possession on seizure under process of the Court.

The contentions made on behalf of the United States may be briefly dismissed. It is unnecessary for instance to determine whether the relation of master and servant existed between the crew of the *Carolinian* and the United States. Whether or not legal liability *in personam* was cast upon the United States by reason of that relationship, the navigators of the *Carolinian* were at fault and this alone creates a right *in rem* against the vessel. It becomes unnecessary, therefore, to discuss whether the non-liability of the United States *in personam* is based upon a substantive rule of law or upon a mere defect of procedure. Nor is anything to be gained by contending (in disregard of the authorities just cited) that an inchoate lien cannot be created against property belonging to the United States, for the sufficient reason that the *Carolinian* was not the property of the United States but that of a private corporation. Even if the proposition were correct (and it is submitted that it is not, see *infra*, pp. 22-37), it could not be extended to *privately owned* vessels, in Government possession. It is well settled that the attributes of sovereignty do not inure to the benefit of private individuals.

Thus in *Moran* v. *Horsky*, 178 U. S. 205, suit had been brought to recover a mining claim, the plaintiff's title resting on a patent from the United States. The defendant set up the defence of laches. This court said:

> "But it is well settled that when the government proceeds to set aside its patent, not for the sake of establishing its own right to the property, but in the interest of some person who has an equitable claim thereto, or to whom the government owes the duty of protecting his interests, it is subjected to the

> same defences of laches, limitation and want of equity that would attach to a like suit by an individual." (178 U. S., at p. 213; see p. 56, *infra.*)

The argument made on behalf of the Government in the lower Court is summed up in the opinion of Judge Rose as follows:—

> "The Government says that the only way in which a ship can become responsible *in rem* for a tort is through the fault of some one, whose relation to her is such that she is answerable for his shortcomings, and that neither the Government nor its property can ordinarily be held liable for wrong done by its servants or agents".

Conceding, for the sake of argument, that both positions taken by Government counsel are correct, the libelant would, nevertheless, be entitled to succeed, for it is well settled that a ship is responsible for the negligence of her navigators. No attempt is here being made to hold the Government responsible for wrong done by its servants, nor is this proceeding against Government property.

The recent decisions of this Court in the case of *The Steam Tug Queen City* (#26 original, not yet officially reported U. S. Adv. Ops. 1920-1921, 664) and *In the Matter of the City of New York, Edward S. Walsh, Superintendent, etc., Petitioner* (#25 original, not yet officially reported U. S. Adv. Ops. 1920-1921, 660) are of no help to the Government.

In the *Queen City* case a libel *in rem* was filed against the tug *Queen City* which was owned by the State of New York and was being used by that State in the public service for the repair and maintenance of the Erie Canal. This Court held that the tug was not subject to seizure because it was being used and employed for public and Governmental purposes.

In the second case libels *in rem* had been filed against three tugs. These tugs were claimed by their owners, a partnership doing business in Buffalo. The claimants of the tugs then filed petitions under the 59th Admiralty Rule (new rule 56) in which they attempted to implead Edward S. Walsh, Superintendent of the Public Works of the State of New York, upon the ground that at the time of the respective disasters the tugs had been chartered to Walsh, as Superintendent of Public Works of the State of New York. The questions before the Court were (1) as to whether a suit in admiralty could be brought against the State of New York and (2) whether a suit against Walsh was in effect a suit against the State of New York. This Court decided the first of these questions in the negative and the second in the affirmative. In other words, all that the decision holds is that there was no power to bring action *in personam* in admiralty against the State of New York.

That a national war vessel may be held in fault for a collision due to the negligence of her officers and crew was directly decided by this Court in *The Sapphire*, 11 Wall. 164.

In that case a collision had occurred between the American ship *Sapphire* and the French transport *Euryale*. To recover for the damages sustained a libel *in rem* was filed against the *Sapphire* in the District Court in the name of Napoleon III, then Emperor of the French, as owner of the *Euryale*. On appeal to this Court it was held that the *Eury-*

ale, as well as the *Sapphire*, was to blame, and that accordingly the damages must be divided.

The collision occurred in consequence of the *Sapphire's* dragging her anchor and drifting down upon the *Euryale*, and this Court held that the officers and crew of the *Euryale* could have avoided the collision if they had promptly hoisted the jib when it was first seen that the *Sapphire* was dragging her anchor. After a discussion of the evidence and the finding that there "was a clear neglect of proper precautions for an entire hour immediately preceding the collision," this Court said:

> "We cannot avoid the conviction that there was a want of proper care and vigilance on the part of the officers of the *Euryale*, and that this contributed to produce the collision which ensued. Both parties being in fault, the damages ought to be equally divided between them." (11 Wall. at p. 171.)

After this decision there can be no question but that a national war vessel may be held at fault for the negligence of her navigators whenever the court obtains jurisdiction. As *Workman* v. *New York City*, *supra*, shows, the liability of a vessel is not affected by the fact that the navigators who were at fault were public servants engaged on public business.

Throughout the requisition charter to the United States, the relations of the Garland Steamship Corporation, as owner of the *Carolinian*, and the United States, as charterer, are carefully kept distinct. By Section 12 of the charter (petition, page 35) it was provided that the United States should have a lien on the vessel for all moneys paid and not earned, and for all advances or overpayments made. The United States cannot, therefore, now contend that it was to have a lien upon its own property, or that the *Carolinian* was immune from liens when it had itself contracted for one. The United States also agreed to assume, by the charter, "all risk of liability for damage occasioned to other vessels, persons or property" (Cl. 4, p. 32). This clause must have been inserted in view of the possibility that a collision lien might attach to the vessel during the currency of the charter. There could be no liability in *personam* on the part of the Garland Steamship Co. as the vessel's crew were not their servants; the only liability left for the United States to assume was the liability of the vessel *in rem.* It was obviously contemplated that a liability *in rem* would exist.

II.

Even if, at the time of the collision, the "Carolinian" had been owned by the United States, an inchoate lien would nevertheless have been created which could be enforced in the present suit.

While there is a very real distinction between a vessel owned by, and one chartered to, the United States, and while the proposition above stated is not necessarily involved in the case at bar, nevertheless, in view of the importance of the question and the far-reaching consequences of a decision establishing immunity, it may not be amiss if the proposition is briefly discussed. If a maritime lien attaches to a vessel *owned* by the Government, *a fortiori* it must also attach to a vessel chartered.

The general principles as to the creation of maritime liens have been considered in the first division of this brief. According to the decisions of this Court there collected, no exception on the part of government owned vessels is recognized. On the contrary this Court has frequently stated that a maritime lien may arise against a vessel or other floating property of the United States. And there is entire unanimity in the lower Federal Courts that a maritime lien may arise against a vessel of the United States, or of a foreign government, and that this lien may be enforced by attachment, *unless the situation of the property is such that in executing the attachment, the court officers will be brought into collision with the officers of the Government.* Inasmuch as these decisions will be discussed at length by counsel in the other cases to be argued herewith, it is unnecessary for us to do more than give some of the citations with a brief statement of the point decided.

The Florence H., 248 Fed. 1012 (vessel owned by the U. S. and chartered by demise to the French Government for the purpose of carrying foodstuffs to France, held subject to a lien for collision).

The F. J. Luckenbach, 267 Fed. 931 (vessel held subject to a lien though used strictly for government purposes at the time of the collision).

The Gloria, 267 Fed. 929 (vessel owned by the U. S., manned by a navy crew, and used for the transportation of troops to France, held subject to a lien for collision).

The Ceylon Maru, 266 Fed. 396 (vessel owned by the U. S., manned by a navy crew and employed in transporting military supplies to the U. S. Army in France, held subject to lien for collision).

The Johnson Lighterage Co. #24, 231 Fed. 365 (property of the Russian government, destined for its public use, held subject to a lien for salvage services).

The Tampico, 16 Fed. 491 (vessel of the Mexican government held subject to a lien for salvage services).

U. S. v. *Wilder,* 3 Sumner, 308 (lien for general average held to exist against property of the U. S.).

The City of Philadelphia, 263 Fed. 234 (vessel taken over by R. R. Administration held subject to collision lien).

The decisions in this Court which are decisive on the subject are *The Siren,* 7 Wall. 152 (a maritime lien for collision held to be created, where a prize, the property of the United States, ran down a privately owned vessel); *The Davis,* 10 Wall. 15 (a maritime lien for salvage enforced against cotton, the property of the United States), and *Workman* v. *New York City,* 179 U. S. 552, which is discussed under the first heading.

In view of the quotations already given from *The Siren* and *The Davis* an elaborate statement of these cases seems unnecessary. In *The Fidelity,* 16 Blatch. 569, Waite, C. J., sitting in Circuit, attempted a distinction of these two cases on the ground that the property against which liens were asserted was not devoted to the public and employed in carrying on the operations of the Government. The case did not call for any such expression of opinion as all that was *decided* was that a city tug, used exclusively for government purposes, was not subject to attachment.

The headnote states the precise point for which the case stands:

> "A steam-tug, the property of a municipal corporation invested with certain powers of local government in a city, and used exclusively by an executive department of such municipal government, as an instrument for performing duties imposed on it by law, *is not liable to seizure* in a suit *in rem* against such steam-tug, in admiralty, in the district court, brought to recover damages for an act of the tug, while actually engaged in public service under the orders of such department." (Italics ours.)

The first paragraph of the opinion is equally explicit:

> "It is well settled, that public property, devoted to public uses, and necessary for carrying on the operations of the government, *is not subject to seizure and sale on execution.* The supreme court of the United States had occasion to consider that question at its last term, in Klein *v.* New Orleans, 99 U. S. 149. It was there said, that 'municipal corporations are the local agents of the government enacting them, and their powers are such as belong to sovereignty. Property and revenue necessary for the exercise of these powers become a part of the machinery of government, and, to permit a creditor to seize and sell them to collect his debt, would be to permit him, in some degree, to destroy the government itself.' 'The test in such cases is as to the necessity of the property for the due exercise of the functions of the municipality.' * * * It would seem to be clear, that, if the instruments of government cannot be seized to pay a debt after judgment, they cannot before.
>
> It is said, however, that the maritime law gave the libellant a lien on the tug for his damages, and that, whenever there is a maritime lien, an action *in rem* lies, in admiralty, for its enforcement. It seems to me that the

> same principle which forbids the seizure to pay a debt, forbids the lien, *which can only be enforced by a seizure.*" (Italics ours.)

The confusion of thought which runs through the opinion starts with the sentence last quoted. A lien "which *can* only be enforced by seizure" of Government property, and which, if enforced, would permit the lienor, "in some degree, to destroy the Government itself," is admittedly ineffective, so long as such conditions exist, and that is the only point decided in *The Fidelity* and the only question which called for discussion. In other words, it was held that the tug which still is the property of the municipality was not "liable to *seizure* in a suit *in rem.*"

In *Workman* v. *New York City, The Fidelity* is narrowed down to this precise point. This Court there said:

> "True it is, that under the general law, growing out of the public nature of their duties, where judgments or decrees are entered against municipal corporations, such judgments or decrees may not, as a matter of public policy, be enforced by the levy on property *held by the corporation for public uses.* Meriwether *v.* Garrett (1880), 102 U. S. 472.
>
> As a result of the general principle by which a municipal corporation has the capacity to sue and be sued, it follows that there is no limitation taking such corporations out of the reach of the process of a court of admiralty, as such courts, within the limit of their jurisdiction, may reach persons having a general capacity to stand in judgment. True, also, where admiralty process has been set in motion against a municipal corporation, public policy, it has been held, restrains a seizure of property used for public purposes by such corporation. The Fidelity (1879), 16 Blatch-

> ford, 569. *This conclusion, however, is but the application of the exception as to the mode of execution of a judgment or decree against such a corporation,* to which we have referred, and its existence in the admiralty law in all cases has also been denied. The Oyster Police Steamers of Maryland (1887), 31 Fed. Rep. 763. Which of these conflicting conclusions, as to the exception in question, is correct, we are not called upon on the present record to determine, since no levy of process upon the fire-boat was made or attempted to be made."

The dictum is confessedly opposed to the language of the opinion in *The Siren* and *The Davis* (16 Blatch., at p. 569), and is altogether inconsistent with the opinion of this Court in the Workman case, *supra,* pp. 11-17. The illustration of naval crews libeling a war vessel for their wages, after she had come into private hands, is extravagant. The crew of a man of war are not "seamen" in a legal sense. They serve under the Articles of War and are a part of the armed forces of the Government and as such are not entitled to a maritime lien. An argument equally far fetched is made on behalf of the Government when it is said that there are but few reported cases where a maritime lien has been enforced against a vessel after she has been returned to private ownership. The reasons for this are obvious. Until the time of the Spanish-American War our Navy was small and there was no Government owned merchant fleet. When collisions occurred it was not an infrequent practice for Congress to pass a bill permitting suits *in personam* against the Government. In many instances, too, settlement was reached without resort to the Courts. The instances in which vessels owned or operated by the

Government subsequently came into private hands were negligible.

Nor is there any basis of principle on which the distinction attempted in *The Fidelity* could be rested. The cotton cargo of the *Davis* may have been urgently needed for the manufacture of uniforms. In the case at bar the only information in the record as to the employment of the *Carolinian* is that she was "employed in public service for war needs." She may have been engaged in carrying coal to be used by French factories which would not have made her any the less a merchant vessel under the decision in *The Lake Monroe,* 250 U. S. 246. She may have been carrying a small quantity of military supplies and the bulk of her cargo may have been food for the civilian population. She may have been on her return voyage to the United States with her subsequent employment undetermined. The refinement suggested in *The Fidelity* would be utterly unworkable under modern conditions, and, as will be shown, there is no principle of "prerogative" or rule of public policy which requires that it be now adopted.

The only basis on which the exemption of government property from such a lien can be rested is the *mediæval* doctrine of "prerogative",—a doctrine which forms no part of our jurisprudence, for it is well settled that the United States has only "so much of the royal prerogatives as belonged to the King in his capacity as *parens patriae* or universal trustee." (*Dollar Savings Bank* v. *U. S.,* 19 Wall. 227.)

In *United States* v. *Wilder, supra,* Mr. Justice Story, in discussing whether a maritime lien for general average could exist against property belonging to the United States, said:

> "The question, then, is, whether a like lien exists in regard to goods belonging to the United States. No case has been cited, in which any exception has ever been made in regard to the United States; *nor has any authority been produced to show that it constitutes a known prerogative of any other government or sovereignty.* I have examined the treatises upon the prerogatives of the crown of England, and I do not find there, or in any of the great abridgments of the law under the title 'Prerogative', any such exception recognized, or even alluded to." (Italics ours.)

The concluding part of Mr. Justice Story's opinion is as follows:

> "And it seems to me a fair inference from the duties of the sovereign, in such cases, that where a lien exists on property, upon general principles of justice, *jure gentium,* that lien ought to be presumed to be admitted and protected by every sovereign, until the presumption is repelled by some positive edict to the contrary. None such exists in our country."

Nor is there any principle of public policy which prevents the creation of a maritime lien against a public vessel owned by the United States. Such a lien does not result in interfering with the performance of governmental functions because so long as the vessel is in government possession she is not subject to attachment. It may result in ultimately casting upon the United States the liability for a collision, as to which the navigators of a government vessel were at fault, but that is only just. When the privately owned vessel is at fault, the United States collects its damages from the ship or her owners, and it is only fair that a private owner should have a like right when the government ship is to blame. Congress has recognized this principle of equality by making the statutory rules for preventing collisions at sea binding upon *public* ships as well as private, 26 Stat. at L. 645; 28 Stat. at L. 645; 2 Fed. Stat. Ann. (2nd ed.) 376, 402, 449. If a merchant ship and a war ship are equally at fault, the damages are divided; *The Sapphire, supra.*

The justice of paying claims arising out of collisions for which public vessels were at fault has always been recognized. By the Act of June 24, 1910 (36 Stat. at L. 607) the Secretary of the Navy is authorized to determine the amounts due arising out of collisions for which naval vessels are found responsible, which claims are to be paid out of moneys appropriated. This statute is, however, limited in amount to claims not exceeding $500. For all larger claims the claimant must secure the passage of a special Act which sometimes merely directs payment and in other cases directs that the question of liability be determined by Court proceedings. It has been the invariable practice of Congress ultimately to pass such an Act. The ensuing delay is, however, often so great as to amount to a denial of justice. A reference to the Acts passed in recent years indicates how great the delay has been in many of the cases:

Bergen-U. S. S. Periwinkle. Accident occurred Jan. 18, 1865. Special Act (31 Stats. 1572) passed 1900.

New York-U. S. S. Dolphin. Accident occurred Aug. 1, 1899. Special Act (32 Stats. 242) passed 1902.

S. S. Foscolia-U. S. S. Columbia. Accident occurred May 28, 1898. Special Act (32 Stats. 242) passed 1902.

Lighter No. 10-Transport Sumner. Accident occurred March 17, 1900. Special Act (33 Stats. 809) passed 1905.

Ella M. Doughty-U. S. S. Massachusetts. Accident occurred June 27, 1901. Special Act (33 Stats. 810) passed 1905.

Olive Frances-U. S. S. Winooski. Accident occurred July 30th, 1866. Special Act (33 Stats. 810) passed 1905.

Maroa-U. S. S. Rocket. Accident occurred Feb. 2, 1907. Special Act (35 Stats. 1622) passed 1909.

Climax-U. S. Tender Cactus. Accident occurred Nov. 25, 1905. Special Act (35 Stats. 1404) passed 1909.

Wilson & Hunting-U. S. S. Culgoa. Accident occurred Nov. 9, 1904. Special Act (36 Stats. 1863) passed 1910.

Dorothy-U. S. S. Sterling. Accident occurred Dec. 3, 1911. Special Act (37 Stats. 1285) passed 1912.

Commonwealth-U. S. S. New Hampshire. Accident occurred July 7, 1912. Special Act (38 Stats. 1244) passed 1914.

S. S. Hesperos-U. S. S. Arethusa. Accident occurred Oct. 18, 1915. Special Act (39 Stats. 1261) passed 1916.

John T. Donohue-C-2. Accident occurred Mar. 28, 1913. Special Act (39 Stats. 1353) passed 1916.

Mabel I. Meyers-U. S. S. Nebraska. Accident occurred July 30, 1915. Special Act (39 Stats. 1393) passed 1916.

Esparta-U. S. Tender Magnolia. Accident occurred Oct. 26, 1905. Special Act (39 Stats. 1474) passed 1917.

It is true that the United States has not as yet passed a general statute permitting suit to be brought in *all* cases where damages have resulted from the faulty navigation of a public vessel. It is clear, however, that this evinces no rule of public policy that the United States should repudiate the just claims of innocent persons whom the negligence of its agents has injured, contrary to the practice of other civilized nations. The long list of special acts, passed to afford relief, is overwhelming evidence that Congress has, for generations, intended that such claims should be paid.

The purpose of Congress is further indicated by a bill now before Congress which will do away with the Government's exemption from suit so far as collision cases are concerned, and make the passage of special acts unnecessary. This bill was favorably reported by the Committee on the Judiciary of the House of Representatives under date of February 7, 1921 (66th Cong. 3rd Sess. House of Representatives, Rept. No. 1301, p. 2 to accompany H. R. No. 15977). As stated in the report,

> "The bill in principle is simply a substitute for the practice, long established, of passing special bills, under which private owners have been allowed to submit to our admiralty courts admiralty claims of this character."

The bill has met with the universal approval of the executive departments, and is expected to pass in the near future.

It is frankly admitted in the brief filed by the Government that there are over two hundred cases, similar to those now before this Court, which involve "losses running into millions of dollars." Probably most of the ships which were guilty of faulty navigation were privately owned, like the *Carolinian*, and merely operating for the Government, under charters. The suggestion of the Department of Justice is that the innocent third parties who have thus been injured (many of whom have already been kept waiting for their compensation for several years), should be told by this Court that they must go to Congress and clog the calendars of both Houses with private bills, authorizing suit to be brought in each particular case.

There is no pretense that the damage has not been done. There can be no honest reason given for not paying for that damage. It must also be admitted that the practice of Congress has been "long established" to pass enabling acts in all cases where such acts are required. Indeed, on page 17 of the Government's brief, it is said:

> "We must assume that, at the proper time and as it is requested, diplomatically or otherwise, Congress will give these claims the consideration they merit."

The present proceeding, therefore, if successful, would, in the end, save the Government nothing and would inflict upon those who have been injured additional and wholly needless hardship.

Where established precedents force this Court to hold that an enabling act *is* required, before suit can be brought to recover damage done by a public vessel of the United States, special legislation will continue to be necessary, until the general legislation, now pending, is passed. Until then, in such cases, this Court can do no more than say, as Dr. Lushington said in *The Athol* (*supra*, p. 15):

> "Sitting here as a judge, in a court of justice, I am bound to express the opinion that

> I cannot apprehend the high personages who represent Her Majesty in her office of Admiralty, will avoid doing justice, or that, upon a due consideration, they will take upon themselves to say that they will be themselves the exclusive judges upon the merits of the present case."

But, where the decisions of this Court do permit suits against privately-owned vessels, once they have passed out of the possession of the Government, and where Congress has already specifically provided that the Government may take over the defence and relieve the private owners of that burden, it must be a satisfaction to this Court, rather than otherwise, not to be forced to delay the doing of that which is demanded by simple justice.

The doctrine of the immunity of the sovereign from suit—to which so many exceptions have been made by statute as almost do away with the rule—is based not upon principle but upon precedent. As was stated by this Court, in *United States* v. *Lee*, 106 U. S. 196:

> "It is difficult to see on what solid foundation of principle the exemption from liability to suit rests" (106 U. S., at p. 206).

So in *U. S.* v. *Emery Bird Thayer Realty Co.*, 237 U. S. 28, the Court said of a contention that the government's submission to jurisdiction should be narrowly construed, that it rested "on the inadmissible premise that the *great act of justice* embodied in the Jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye." (Italics ours, 237 U. S., at p. 32.)

As stated in *Workman* v. *New York City, supra,* in the case of a collision between a British public vessel and the ship of a subject or a foreigner, it is the established English practice to permit the private owner to begin suit in the English courts against the navigating officer of the Government vessel. As a matter of course, the solicitor for the Treasury appears on behalf of the respondent. The case is tried as if between private parties, with similar rights of appeal to either litigant. If it is shown that the public vessel, through her navigators, was at fault, the Government, after judicial assessment of the damages, pays the loss sustained by the private owner.

> Roscoe's Admiralty Practice (1920), pp. 97, 297.
> The Bellerophon, 3 Aspin, M. C. 58.
> The Sans Pareil [1900], Prob. D. 267.
> The St. Paul and The Gladiator, 11 Asp. 152, 169 [1908] Prob. D. 320, [1909] Prob. D. 43.

In France and Germany, relief is afforded through judicial tribunals for the damages sustained under such circumstances. See Goodnow, Comparative Administrative Law, Vol. II, pages 161, 162. Borchard, Diplomatic Protection of Citizens Abroad, p. 166, note 2.

The State of New York which, judged by its wealth and the number of its inhabitants, is of greater consequence than many European nations, is subject to suit for damages arising out of a 'wrongful act, neglect or default'' to the same extent as if it were a private individual or corporation. As stated in *Arnold* v. *State of New York,* 163 App. Div. 253, at pp. 261, 262:

> "While the State, being a sovereign, cannot be sued by a subject without its consent, by one of its own statutes *passed as an act of justice* to its subjects it has expressly assumed liability for damages caused by 'a wrongful act, neglect or default' on its part and has authorized the Board of Claims to hear and determine all claims founded on its negligence, which necessarily means the negligence of its own officers acting within the apparent scope of their powers, or while engaged in conducting its business. (Code Civ. Proc., sec. 264). It has also provided that its liability in such and other cases shall be measured by 'such legal evidence as would establish liability against an individual or corporation in a court of law or equity'. (Id.)" (Italics ours.)

In the *Arnold* case, the State of New York was held liable to persons who had been injured, and to the representatives of other persons who had been killed, for the negligence of its State Fair Commissioners in conducting an automobile race, one of the automobiles leaving the track and killing and injuring some of the spectators. In the *Arnold* case the Court further said:

> "While the Commissioners were not authorized to be negligent any more than the officers of a corporation are so authorized, still they had the capacity to be negligent, and if, in holding a fair for the State they were negligent, it was the negligence of the State, just as the negligence of officers of a corporation is the negligence of such corporation. Otherwise the assumption of liability by the State for damages caused by 'a wrongful act, neglect or default on the part of the State' would be meaningless and without effect. How can the State be guilty of a wrongful act, neglect or default except through its 'officers and

> employees,' and if those words were inserted in the statute it would not add to its meaning. (*Sipple* v. *State*, 99 N. Y. 284, 288.) The evidence of negligence in these cases would completely overwhelm a private individual or corporation, and the situation is the same in principle, although the State is defendant. (*Quayle* v. *State of New York*, 192 N. Y. 47, 51; *Bowen* v. *State of New York*, 108 id. 166; *Burks* v. *State of New York*, 13 Court of Claims, 153; less fully reported, *sub nom Burke* v. *State of New York*, 64 Misc. Rep. 558)." (163 App. Div. at p. 262.)

To sum up the position of the libelant: This Court and the other federal courts have frequently decided that a vessel, even though owned by the United States and employed in public service, is subject to a maritime lien for collision which may be enforced by a proceeding *in rem*, provided the government's possession is not interfered with. This proposition is believed to be firmly settled. Even if this Court were not bound by its prior decisions, the same result would be reached. Under the ordinary maritime rule, a lien attaches to a vessel at fault for a collision. There is no basis, either on the ground of prerogative or of public policy, for making an exception of vessels owned by the United States and used for public purposes. As stated in *The Davis, supra*, the very fact that the party injured is without remedy, in the absence of a special act of Congress, is a good reason for holding that such a lien exists.

Nor is the fact that a lien might not be presently enforcible an argument against its existence. *The Siren*, 7 Wall. 152, 156-158.

III.

The act of March 9th, 1920, is an express recognition by Congress that a maritime lien may exist against a public vessel even though used solely for governmental purposes and as the United States has secured the release of the "Carolinian" under this Act it cannot now contend that the court is without jurisdiction.

In a discussion of the Act of March 9th, it will be necessary to refer briefly to its history and purpose.

The original Shipping Act of September 9th, 1916, contained a clause relating to vessels purchased, chartered or leased from the Shipping Board as follows:—

> "Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien or other interest therein".

This clause came before this Court for interpretation in *The Lake Monroe*, 250 U. S. 246. In that case a libel *in rem* for a collision had been filed against the *Lake Monroe*, a vessel which had been requisitioned for title by the United States under the provisions of the Act of June 15, 1917. At the time of the collision the *Lake Monroe* was employed under charter to private persons in carrying a cargo of coal to New England. The United States claimed immunity from process, arguing that the provisions of Section 9 of the Shipping

Act were limited to vessels acquired by the Government under that Act and had no application to vessels requisitioned under the Act of June 15th, 1917. This contention was overruled by this Court and the *Lake Monroe* held subject to attachment.

The decision caused considerable embarrassment to the attorneys for the government. They claimed that although Shipping Board vessels were thereby made subject to libels *in rem*, there was no government official who had authority to give bonds and thus release a vessel which had been attached. As a temporary expedient bonds were given by the Emergency Fleet Corporation, but this proved unsatisfactory as a permanent solution because of a doubt as to the legal authority of the Fleet Corporation to give bonds in all cases.

It was chiefly in order to meet this situation that the Act of March 9th, 1920, was introduced in Congress by the Government.* Section 1 of this Act provides that no vessel owned or in the possession of the United States or of a corporation in which the United States owns the capital stock shall be subject to arrest or seizure. Section 2 of the Act provides for a libel *in personam* against the United States or such corporation in cases where liability would exist against a private party "*provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation*". Section 3 of the Act provides that such a suit shall proceed as in like cases between private parties; that the United States shall not be required to give any bonds or stipulations; and that any bond or stipulation previously given by the Shipping Board or Emergency Fleet Corporation shall be cancelled upon the suggestion of the Attorney General that the United States is interested in the cause and assumes liability to pay any decree that may be entered.

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* The Act of March 9, 1920, will be found in the Appendix.

Another problem had also become pressing. During the war the United States had employed a large number of ships in transporting army supplies and other like service. Some of these ships had been requisitioned for title under the Acts of June 15th, 1917; others like the *Carolinian* had been merely taken into government possession. In very many instances collisions had occurred for which damages had been claimed by the owners of the injured vessels. After the Armistice, vessels which had been merely *chartered* were turned back to their owners and vessels *owned* by the United States were put up for sale. It was obvious, in view of the decisions of this Court, that as soon as these vessels went into private hands they would be libelled. It, therefore, became necessary for the government to protect the owners of the vessels which it had chartered, and the intending purchasers of the vessels which it owned. This was the obvious purpose of Section 4 of the Act, which is as follows:—

> "Sec. 4. That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release,

> and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States *in accordance with the provisions of this Act*". (Italics ours.)

The concluding sentence of Section 4 that upon the suggestion by the Attorney General "thereafter such cause shall proceed against the United States in accordance with the provisions of this Act" plainly incorporates in Section 4 the provisions of Section 3 as follows:—

> "Sec. 3. That such suits shall proceed and shall be heard and determined *according to the principles of law* and to *the rules of practice obtaining in like cases between private parties.* A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction." (Italics ours.)

It is obvious that the incorporation of Section 3 in Section 4 defeats the Government's contention that the Court was without jurisdiction because a lien is asserted against a government vessel. This would not be "according to the principles * * * obtaining in like cases between private parties." There is no provision in the Act entitling the United States, after appearing under Section 4, to raise objection to the Court's jurisdiction. If the United States appears under Section 4 it must appear generally, and the Court will then proceed as if the suit were between private parties. That this was the intention of Congress is further shown by the provisions of Section 7 of the Act which authorizes the giving of a bond in case a Shipping Board vessel is arrested *in a foreign country.* The concluding sentence of Section 7 is "that nothing in *this* section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case." Clearly a like clause was advisedly omitted from Section 4 because Congress intended that cases in which the government intervened under Section 4 should be tried without resort to the technical doctrine of governmental immunity.

It will further be noted that Section 4 is not limited to liabilities incurred by ships operating as "merchant vessels" as is provided in Section 2 of the Act. On the contrary, Section 4 applies to liabilities arising "from previous possession, ownership or operation of such vessel by the United States," without qualification. In view of the fact that at the time of the passage of the Act it was well known that many claims had been presented for damages incurred while Shipping Board vessels were employed in carrying troops and supplies to France, this is extremely significant.

The Act was discussed at length by its draftsman, Mr. Ira A. Campbell, before the Committee on the Judiciary of the House of Representatives (66th Congress, First Session, Hearing on H. R. 7124, Serial 4, August 26, 1919). Mr. Campbell had been Admiralty Counsel of the United States Shipping Board from May 1, 1918, to August 1, 1919, and at the time of the hearing was Special

Assistant to the Attorney General in Admiralty matters. After stating the purposes of the first three sections substantially as above, he read what is now section 4 of the Act, and continued:

> "That is a special provision which is intended to meet a situation which has developed out of the war. The Government has had under requisition a large number of privately owned vessels. We have had them under requisition under two forms of charter parties, technically known as time form and bare boat form. Under a time form, the owner furnished the crew and the Government furnished the fuel; that is the chief distinction. Under the bare boat form, the Government took the bare boat over and managed and operated the vessel itself. Under the time form the Government assumed the war risks but did not assume the marine risks, so that if a requisitioned vessel operating under a time form was in collision as a result of negligence in navigation, the risk of collision was carried by the owner of the vessels and undoubtedly insured against by private underwriters. The Government carried the war risk. When the board took over vessels on the bare boat form and managed and operated them, the Government assumed all the risks, both war and marine risks.
>
> For example, we have two actual cases existing in the Department of Justice at the present time. The Association Oil tanker, *Frank H. Buck*, was requisitioned by the Government and taken over on the bare-boat form, and was turned over to the Navy Department by the Shipping Board, and operated by the Navy Department as an oil tanker. While so operating she was in collision with a Standard Oil tanker which was under a time form, where the owner was carrying the liability. While the *Frank H. Buck* was in the possession of the United States, she could not be

> attached or libeled, *but the moment that she came out of the possession of the United States and went back into the possession of the Associated Oil Co., she became subject to libel on the part of the Standard Oil Co., under a decision of the Supreme Court of the United States.* (*The Siren,* 7 Wall. 152.) And she has been so attached. After it was delivered back to the Associated Oil Co. the Standard Oil Co. libeled the ship at Los Angeles, Calif. Under the form of charter party the Government has got to assume that liability.
>
> What I am providing here is that when a case of that kind arises, where a privately owned vessel out of the possession of the United States is arrested in any suit *in rem* (or) attached in any suit *in personam*, such vessel shall be immediately released without bond or stipulation being required therefor, upon the Government intervening and assuming responsibility for any liability arising in such suit. So that if when the *Frank H. Buck* was libeled at Los Angeles, the Government had wanted to admit its liability, responsibility for the liability arising out of the collision, then under this section, it could have gone into the United States District Court at Los Angeles and said, 'We assume responsibility for this collision,' and thereupon the court would have ordered a release of the vessel without compelling the Government to give bond" (p. 18—Italics ours).

It is plain that at this time, at least, the legal advisers of the Government did not contend that no collision lien could exist against a vessel employed in public service.

The plain language of the Act is that if the government intervenes in a suit for collision or other suit *in rem* under Section 4, the case shall be tried as if it were a suit between private parties. If the United States takes the benefit of the Act, and secures the release of a vessel without giving bond, it must also assume the burden.

The provisions of Sections 3 and 4 of the Act are entirely consonant with the decisions of this Court cited in the first and second divisions of this brief. Congress has unquestionably recognized the rule that a vessel "by whomsoever owned and navigated" is subject to maritime liens; it was cognizant of the fact that many such liens had been created against vessels owned or in the possession of the United States and employed in naval or military service; and it was to protect the owners and purchasers of such vessels and to place a liability upon the government which it was its duty to bear, that Section 4 was enacted.

IV.

Reply to Brief Submitted on Behalf of the United States.

(1) On page 12 of the brief submitted on behalf of the United States, reference is made to the fact that on several occasions requests have been made to Congress to subject public vessels to the liability of merchant vessels and to provide remedies for the enforcement thereof. It is then stated:

> "After thorough consideration, Congress refused to subject public vessels to the Admiralty jurisdiction or to grant a remedy *in personam* against the Government."

This statement is incorrect. The actual facts are that when the Act of March 9, 1920, was presented on the floor of the House, it was sought to amend the Act so as to make it specifically applicable to all Government vessels, even though not employed as merchant vessels (Congressional Record, 66th Congress, 2nd Session, Vol. 59, p. 1759). The amendment was objected to on the point of order that it was not germane to the subject of the bill (Congressional Record, Vol. 59, p. 1828) and after considerable discussion the Chairman ruled that the point of order was well taken and the amendment was accordingly ruled out (Congressional Record, Vol. 59, p. 1832). This obviously determined nothing as to the merit of the amendment.

Thereafter an original bill was introduced in the House of Representatives which specifically authorized the bringing of suits for collision against the United States, even where non-commercial vessels were concerned. This bill is referred to at page 32 of our brief, and, as there stated, it has been favorably reported by the Committee on the Judiciary. The purpose of the bill is stated in the report of the Committee, as follows:

> "The chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as a result of a collision with any Government-owned vessel, without requiring an application to Congress, in each particular instance, for the passage of a special enabling act" (66th Congress, 3rd session, Report No. 1301, pp. 1, 2).

As already stated, this bill has been endorsed by the various departments of the Government and by the Committee on the Judiciary, and should be passed as soon as reached on the calendar.

While the Department of Justice may feel compelled to submit the question involved in the test cases, for the final decision of this Court, it is not inappropriate, perhaps, to state that the other Departments of the Government are actually in favor of allowing suits against the United States in *all* cases of collision involving public vessels. The attitude of those Departments was clearly shown during the hearing before the Committee on the Judiciary of the House of Representatives, to which reference is made in the Government's brief. This testimony is referred to in the favorable report submitted by the House Committee on the Judiciary (66th Cong., 3rd Session, House of Representatives Report No. 1301), from which report the following is quoted:

> "Upon the hearing before the committee held November 13, 1919, the Navy Department was represented by the assistant solicitor of the department, Mr. Albert E. Shoemaker. Mr. Shoemaker sets forth, compactly, both the sympathy of the department with such legislation and the situation which to-day confronts private owners:
>
> > " 'Mr. Chairman and gentlemen of the committee, the Navy Department is in position to thoroughly sympathize with the shippers [shipowners ?] in pressing for this legislation. Since the beginning of the war collisions involving Government vessels, and I might say naval vessels, have increased probably 1,000 per cent. The department has no authority to pay claims arising out of collisions involving naval vessels or vessels operated by the Navy, and there are no appropriations available to pay such claims. There is a

> law, however, upon the statute books, enacted June 24, 1910, which authorizes the Secretary of the Navy to adjust and determine the amounts that may be due on collision claims when such amounts are not in excess of $500. Under that law quite a large number of claims of that character are referred to Congress from time to time for appropriations.
>
> " 'A claim in excess of $500 requires a special act of Congress.'

"In the course of Mr. Shoemaker's argument the committee requested that the Navy Department submit a written statement of its official view, and on December 2, 1919, Hon. Franklin D. Roosevelt, Acting Secretary, wrote the chairman of the committee, in part, as follows:

> " 'It is understood that at the hearing before your committee it was urged by the private shipping interests that section 2 be amended, so as to make war vessels subject to libel *in personam* as in case of cargo and passenger-carrying vessels, as therein provided. It is believed that no reasonable objection can be offered against such amendment provided that certain other amendments * * * be incorporated in the bill.
>
> " 'Heretofore the department has adjusted and referred to Congress many claims arising out of damages caused to privately owned property by war vessels, under the provisions of the law of June 24, 1910 (36 Stat. L. 607), and it has recommended favorable action on a number of bills introduced in Congress for the purpose of authorizing claimants to bring action against the United States to recover sums of money as damages resulting from collisions involving war vessels. It seems there should be no distinction made between commerce or passenger-

> carrying vessels and war vessels when the question of liability for damages caused is involved.'

"The War Department was represented at the hearing on November 13, 1919, by Brig. Gen. Frank T. Hines, Chief of the Transportation Service. His attitude was that, if the department was safeguarded from interruption in the movement of its vessels, there would be no objection to providing a means for 'promptly settling any just claims against the department.' From his argument the following is quoted:

> " '* * * if there is no intent to infringe upon the authority which the Executive has in time of war, and nothing that would tie the hands of the United States in promptly conducting its necessary operations in an emergency, certainly we could have no objection. * * *
>
> " 'MR. IGOE: If this is put upon the same basis as a proceeding, for instance, in the Court of Claims on a contract against the Government, interfering no more with your operations than such a proceeding would, could there be any objection then from the standpoint of the actual working and conduct of the business of the War Department? I am not referring now to the additional work that would be put upon the officers in the way of defending suits, but I am referring especially to the operations of moving supplies, troops, etc.
>
> " 'GEN. HINES: Just so the department is able to move a vessel when it wishes. That is the important thing. I feel sure that the department would certainly have no objection to providing a means of promptly settling any just claims against the department or any other agencies that were involved, but most certainly it would be very inexpedient to tie our hands in any way.'

"The Department of Justice was represented at said hearing by Mr. La Rue Brown. Mr. Brown made it perfectly clear that the Department of Justice had no objection to make such legislation, on principle (serial 8, pp. 9 and 16):

> " 'The interest of the Department of Justice is limited solely to the efficient and economic conduct of the business especially submitted to it, namely, the defense of the interests of the United States in such litigations as may be brought, and it has no interest in any question of policy with respect to the inclusion of the liability of ships, other than these merchant ships, or any other question of general policy. Those, it conceives, are questions for the Shipping Board, private interests, for the War and Navy Departments, and for the State Department. * * *
>
> " 'This question of whether other public vessels of the United States should be made subject to process in the same manner as are those of the merchant fleet, is, of course, exactly one of the questions upon which I do not feel authorized to express any view. I would say, of course, from our point of view we have no objections to make. We would accept without question the judgment of the departments on the Government's interest and be content with whatever disposition is made by the Committee.'

"The United States Shipping Board was represented at the hearing by Mr. Charles F. Dutch, admiralty counsel of the board. Like Mr. Brown, Mr. Dutch did not feel justified in expressing, officially, the view of the Shipping Board regarding the proposed amendment, feeling that the question was one for Congress and not for the board. He made perfectly clear, however, what his personal view was and what his official view would be, if it were proper to express one. He said (serial 8, pp. 45 and 46):

> " 'I take it, your hearing is primarily upon this proposed amendment to broaden this bill so that it will extend beyond the vessels in the merchant service to all public vessels. Of course, as to that point I am not authorized to speak officially.
>
> " 'I should like to say, as an individual, that we men all realize that one of the worst evils to-day in the halls of legislature is the existence of the private bill. It is pernicious in most any form in which it puts up its head, and in the orderly process of government, as far as I can make out, every witness who has appeared before you to-day has agreed that there must be some solution for a very real difficulty, a very real predicament. * * *' "

(2) On page 14 of his brief the Solicitor General, to our surprise, quotes some extracts from the debates in the House, for the proposition that the Government, even if it appears under Section 4 of the Act of March 9, 1920, may still raise the issue that no maritime lien exists against the vessel libelled because of her public employment at the time of the collision.

The language quoted is directly opposed to the contention of the Solicitor General. Mr. Husted specifically stated, referring to the case of a vessel which, having been in collision while in Government possession and ownership, was thereafter sold by the Government:

> "And the vessel, not now being under the ownership and possession of the Government, *therefore she would be liable as a private ves-*

> *sel and subject to arrest and seizure, just exactly as any other private vessel when sued.* Where the United States is concerned, we provide here by the suggestion of the Attorney General, that the Government will assume responsibility." (Brief on behalf of the United States, p. 15. Italics ours.)

Thus, far from suggesting that the Attorney General could claim immunity after intervening under Section 4, Mr. Husted asserted unqualifiedly that such a vessel was subject to a lien, the responsibility for the discharge of which would be assumed by the United States by its intervention.

(3) At pages 16 and 17 of his brief, the Solicitor General cites a number of decisions for the proposition that at the time of the collision the *Carolinian* was a vessel "belonging to the Government." The cases cited hold that *within the meaning of certain contracts and statutes,* vessels which have been chartered on a bare boat basis are to be considered as "belonging to" the charterer. No case can, of course, be found holding that a bare boat charter changes the property in a vessel.

In *Baltimore Dry Dock & Shipbuilding Company* v. *N. Y. & Porto Rico Steamship Co.,* 262 Fed. 485, the United States had conveyed a site for a dry dock subject to its right to use the dry dock "at any time for the prompt examination and repairing of vessels belonging to the United States, free from charge for docking." The question before the court was whether the United States was bound to pay dockage charges for the use of the dry dock by the s/s *Isabela,* which, although privately owned, was under a demise charter by requisition to the United States. In holding that the *Isabela* fell within the terms of the Government exemption, the court pointed out that the words "belonging to" were susceptible of different meanings and stated that "It is but fair to assume that it was the purpose of the representatives of the Government to at least secure the free use of these dry docks for all ships being operated under its" (the Government's) "exclusive control" (262 Fed., pp. 487, 488).

In *The Master, Wardens and Assistants of the Trinity House* v. *Clark*, 4 M. & S. 288 (King's Bench 1815), the defendant had executed a demise charter of his ship to the Commissioners of the transport service on behalf of the Crown. It was held that as the ship was in the possession of the Crown by the demise, defendant was not liable to pay lighthouse duties, etc., to the Master of Trinity House.

In *The Sarpen*, L. R. 1916, P. D. 306, the action was for salvage, brought by the owners of the tug *Simla* against the steamer *Sarpen*. At the time the salvage services were rendered, the *Simla* was under a requisition charter to the British Government, the terms of which did not amount to a demise. It was held that the owners of the *Simla* were entitled to recover salvage; that the *Simla* was not a ship "belonging to His Majesty" within the meaning of Section 567 of the Merchant Shipping Act, which prevents the recovery of salvage when services are rendered by Government owned ships.

In *The Matti*, L. R. 1918, P. D. 314, a German steamship had been seized as prize in a British port on the outbreak of war. Under a decree of the Prize Court she was ordered to be detained until the conclusion of peace or further order. She was subsequently delivered to the Lords Commissioners of the Admiralty in accordance with the Prize Court rules. While in the service of the Admiralty and in September, 1917, she rendered salvage services. It was held that she was a ship belonging to His Majesty within the meaning of Section 557 of the Merchant Shipping Act and that accordingly the Admiralty could not claim salvage.

In *Admiralty Commissioners* v. *Page,* L. R. 1919, 1 K. B. 299, a tug had been requisitioned by the British Admiralty upon terms which amounted to a demise. During the requisition and in January, 1917, the tug rendered salvage services to another vessel. The Merchant Shipping (Salvage) Act 1916, provided:

> "Where salvage services are rendered by any ship belonging to His Majesty and that ship is * * * a tug, the Admiralty shall * * * be entitled to claim salvage."

It was held that the tug was a "ship belonging to His Majesty," within the meaning of the Merchant Shipping (Salvage) Act 1916, and that therefore the Admiralty and not the owners of the tug were entitled to the salvage award.

In *Thorp* v. *Hammond,* 12 Wall. 408, the general owners of a ship had turned her over for management to one of their number under an agreement by which he, in effect, became charterer of the vessel without the management, control, restraint or possession of the other owners. The question before the court was whether in a collision action the other owners could be held liable. On this point the Supreme Court was equally divided. In the opinion, the owner who actually operated the vessel is spoken of as owner *"pro hac vice."* This is, of course, merely a figurative way of expressing the thought that a charterer by demise is in possession and has many of the rights of an owner.

In *The Barnstable,* 181 U. S. 464, 468 (cited *supra,* pages 8, 9), this Court quotes Revised Statutes, Section 4286, as follows:

> "The charterer of any vessel, in case he shall man, victual and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this title relating to the limitation of the liability of owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

The provisions of the statute show that Congress was of the opinion that a charterer by demise was not in fact the "owner" and the statute therefore expressly states that, so far as regards the right to limit liability, a charterer by demise shall be *deemed* the owner.

The question in the case at bar is not whether a vessel under demise charter may be properly considered as "belonging to" or "owned by" the charterer, *within the meaning of contracts or statutes.* It will not be contended that a charter by demise is equivalent to a sale of the ship, vesting the ownership in the charterer. A charter by demise is, of course, merely a bailment of the ship to the charterer, which does not transfer the title to the property bailed (See article on Bailments, 6 Corpus Juris, p. 1084). There was therefore merely a transfer of the *possession* of the *Carolinian* and no authority has been, or could be, cited for the proposition that private property, even though in Government possession, is immune from maritime liens.

An illustration will show the absurdity to which the proposition contended for by the Government leads. Suppose that after the collision and as a consequence thereof, salvage services had been rendered to the *Carolinian,* and further assume that she had on board cargo belonging to private individuals, which cargo would, of course, be in the possession of the United States as bailee. Surely it would not be argued that the salvage lien did not attach to this private property even though it was in the Government's possession when the services were rendered.

(4) At page 17 of the brief, the Solicitor General cites *Bigby* v. *United States,* 188 U. S. 400, *Langford* v. *United States,* 101 U. S. 341, and *Gibbons* v. *United States,* 8 Wall. 269.

These cases are not at all in point.

In *Bigby* v. *United States,* the plaintiff had been injured through the fall of an elevator in the Post Office Building in New York. It was held that the action did not fall within the jurisdiction of the Court of Claims because the case was one "sounding in tort."

In *Langford* v. *United States,* 101 U. S. 341, the suit was brought to recover for the use and occupation of certain lands and buildings. It was held that any claim that might exist against the United States was based upon a tortious taking and accordingly that the Court of Claims had no jurisdiction.

Gibbons v. *United States* was an action against the United States in contract for the sale of a quantity of oats. This Court held that the Court of Claims had jurisdiction except as to one item which it declared was based on tort.

(5) The decision in *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452, *Board of Commissioners* v. *O'Connor*, 86 Ind. 531 and *Rowley* Conklin, 89 Minn. 172, cited p. 18, hold merely that mechanics' and laborers' liens cannot be enforc against public property.

The case of *The Fidelity,* 16 Blatch, 569, has already been discussed *supra* (pp. 24-26). The *dicta* of Waite, C. J., have always been disregarded in the many subsequent decisions which have dealt with the question (including the cases now before this Court).

The quotations made from *The Parlement Belge* (4 Asp. M. C. 234) at page 20 of the brief submitted by the Solicitor General, show, at the most, that the question was left open whether a maritime lien for collision could exist against a public vessel.

(6) At pages 21-26 it is suggested that the well settled rule as to maritime liens does not app except to commercial vessels. There is no shre of authority for such a distinction and it is directly in the teeth of the overwhelming weight of authority and of the principle, often enunciated by this Court, that "the ship, *by whomsoever owned* or navigated, is considered as herself th wrongdoer, liable for the tort and *subject to a maritime lien for the damages.*" (*The John G. Stevens*, 170 U. S. 120).

And this argument rests upon the fanciful assumption that the *Carolinian,* at all times a p vately owned merchant vessel, ***acquired a new personality*** after the termination of her charter to the United States. (Brief on behalf of the U. S., p. 24).

(7) At page 27, the Solicitor General attempts to distinguish *The Davis,* 10 Wall., 15, *Long* v.

Tampico, 16 Fed. 491, and *The Johnson Lighterage Co. #24,* 231 Fed. 365, on the ground that these were cases where a maritime lien was based on contract and not on tort.

This distinction is wholly inadmissible.

In *The Davis,* a suit *in rem* for salvage was sustained against property belonging to the United States. It is true that the United States, by statute, permitted suit to be brought against it for contract claims in the Court of Claims. No statute, however, had declared that a *maritime lien* could be created against Government property, even in cases of contract. Nevertheless, this Court held that the general maritime law applied and that a lien had in fact been created against the property of the Government.

The attempted distinction of *Long* v. *Tampico* and the *Johnson Lighterage Company* case has even less justification. In both of these cases it was held that maritime liens for salvage arose against public property of foreign governments,—in *Long* v. *Tampico* the property involved being a Revenue Cutter, and, in the *Johnson Lighterage* case, munitions of war. The decisions cannot be based on any waiver of immunity by the respective foreign governments because there was nothing to show that either Mexico or Russia had waived immunity even as to contract claims. Nevertheless, the courts held that the maritime law applied; that liens had been created and were enforcible.

(8) At pages 27 and 28, the Solicitor General discusses the question as to whether the inability to bring suit against the sovereign is based upon an absence of remedy or an absence of right.

As we have already pointed out (page 18), this question does not arise. The libelant's case is based upon the principle that a vessel "by whomsoever owned or navigated" is liable *in rem* for her misdoings. Inasmuch, therefore, as the *Carolinian's* navigators were at fault and as the *Carolinian* was subject to attachment when the libel was filed, the libellant's case is made out.

In connection with the Solicitor General's argument, however, it may not be amiss to point out that in fact the non-liability of the sovereign is based upon an absence of remedy and not upon a lack of cause of action. The immunity of a sovereign from suit goes back to the feudal days when the Court was held by the King in person. The origin of the rule is stated in Pollock & Maitland's History of English Law, Vol. 1, page 502, as follows:

> "He" (the King) "cannot be compelled to answer in his own court, but this is true of every petty lord in every petty manor; that there happens to be in this world no court above his court is, we may say, an accident."

Judge Cooley, in his well known treatise on Torts (3rd Edition, Vol. I, page 208), said:

> "Even the State or the General Government may be guilty of individual wrongs; for while each is a sovereignty, it is a corporation also, and as such capable of doing wrongful acts. The difficulty here is with the remedy, not with the right. No sovereignty is subject to suits, except with its own consent. But either this consent is given by general law, or some tribunal is established with power to hear all just claims. Or if neither of these is done, the tort remains."

(For interesting discussions of the question, see 30 Harvard Law Review, 20, 32 Harvard Law Review, 447, cited by the Solicitor General, p. 28.)

Congress has, in fact, recognized that a tort *liability* exists by the frequent passage of special acts, and by authorizing the Secretary of the Navy to settle collision claims for small amounts (*supra*, pp. 28, 29).

(9) At pages 28 to 34, the Solicitor General attempts to distinguish *The Siren*, 7 Wall. 152, and *Workman* v. *City of New York*, 179 U. S. 552.

With regard to *The Siren*, the brief of the Solicitor General conveys the impression that although she was in the possession of the United States, she remained in enemy ownership at the time of the collision. This is in direct conflict with the decision which reads (7 Wall., at page 162):

> "Here, however, the title was divested from the previous owner *by the capture*, that being lawful, and vested in the United States (in trust as to one-half for the captors), although the legality of the capture was not established until the sentence of condemnation." (Italics ours.)

Further distinction is sought to be made on the ground that "The Government, as actor, sought the distribution of the fund" (Brief, p. 31). This is obviously immaterial because what was actually decided in *The Siren* was that a maritime lien was created against the vessel by the collision. It should, moreover, be pointed out that in the case at bar it is the Government which is the actor in a suit solely between private parties. The libelant has not brought suit against Government property or against the Government *in personam*. Any questions as to jurisdiction have resulted solely because of the Government's unsolicited intervention.

For further discussion of *The Siren*, see *supra*, pages 24, 25.

The principles stated by this Court in *Workman v. City* cannot be dismissed as mere *obiter dicta*. That case is consonant with all of the prior authorities and has been consistently followed ever since. While there was a dissent from the majority opinion (on the ground that a municipal corporation should not be liable *in personam* for negligence in the performance of a governmental act) there was no dissent from the propositions as to maritime liens laid down in the opinion of the Court.

V.

The order to show cause should be discharged and the petition dismissed.

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Appendix.

AN ACT AUTHORIZING SUITS AGAINST THE UNITED STATES IN ADMIRALTY, SUITS FOR SALVAGE SERVICES, AND PROVIDING FOR THE RELEASE OF MERCHANT VESSELS BELONGING TO THE UNITED STATES FROM ARREST AND ATTACHMENT IN FOREIGN JURISDICTIONS, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possession: *Provided,* That this Act shall not apply to the Panama Railroad Company.

Sec. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

Sec. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice of obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude that the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bonds or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act.

Sec. 4. That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act.

Sec. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises.

Sec. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

Sec. 7. That if any vessel or cargo within the purview of sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: *Provided, however,* That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case.

Sec. 8. That any final judgment rendered in any suit herein authorized, and any final judgment within the purview of sections 4 and 7 of this Act, and any arbitration award or settlement had and agreed to under the provisions of section 9 of this

Act, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement.

Sec. 9. That the Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation, having control of the possession or operation of any merchant vessel are, and each hereby is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of section 2, 4, 7, and 10 of this Act.

Sec. 10. That the United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such corporation, having control of the possession or operation of such vessel.

Sec. 11. That all moneys recovered in any suit brought by the United States on any cause of action arising from, or in connection with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage, or ownership of any cargo, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such aforesaid corporation, having control of the vessel or cargo with respect to which such cause of action arises, for reimbursement of the appropriation, or insurance fund, or other funds, from which the loss, damage, or compensation for which said judgment was recovered has been or will be paid.

Sec. 12. That the Attorney General shall report to the Congress at each session thereof the suits under this Act in which final judgment shall have been rendered for or against the United States and such aforesaid corporation and the Secretary of any department of the Government of the United States, and the United States Shipping Board, and the board of trustees of any such aforesaid corporation, shall likewise report the arbitration awards or settlements of claims which shall have been agreed to since the previous session, and in which the time to appeal shall have expired or have been waived.

Sec. 13. That the provisions of all other Acts inconsistent herewith are hereby repealed.

Approved, March 9, 1920.